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In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 70-152

MINNEAPOLIS FEDERATION OF TEACHERS, LOCAL NO. 59
Petitioner

vs.

DOUGLAS M. HEAD, ATTORNEY GENERAL, STATE OF MINNESOTA; KEITH W. DAVIDSON, KATHERINE V. HOWARD, HARVEY A. RING AND BETTY K. ROBB, ON BEHALF OF THEMSELVES AND ALL OTHER TAXPAYERS AND RESIDENTS OF SPECIAL SCHOOL DISTRICT NO. 1 OF THE CITY OF MINNEAPOLIS; SPECIAL SCHOOL DISTRICT NO. 1 AND ITS BOARD OF EDUCATION; CITY OF MINNEAPOLIS EDUCATION ASSOCIATION; AND JOHN DOE.
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MINNESOTA

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OPINION BELOW

The opinion of the Supreme Court of the State of Minnesota is reported at 182 N.W.2d 887. It has not yet been reported in the official Minnesota Reports. A copy of the opinion appears in the appendix hereto.

JURISDICTION

The judgment of the Minnesota Supreme Court, the highest court in the State of Minnesota, was made and entered on December 9, 1970. A timely petition for rehearing was denied on February 9, 1971, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under *28 U.S.C.* §1257 (3).

QUESTIONS PRESENTED

1. Whether a state which places full authority in a school board to determine the salaries of its tenured and nontenured teacher employees without affording aggrieved teachers opportunity for an evidentiary hearing, or other adequate substitute remedy, to determine the reasonableness of those salaries, denies teachers substantive and procedural due process in violation of the Due Process clause of the Fourteenth Amendment.

2. Whether a state statute which allows a school board to terminate the employment and compensation of tenured and nontenured public school teachers without affording them opportunity for review or for a hearing prior to termination denies those teachers procedural due process in violation of the Due Process Clause of the Fourteenth Amendment.

3. Whether state statutes which impose no penalties on one group of striking public employees but impose automatic and harsh penalties on a second group, and which provide the first group with more effective impasse procedures than are provided for the second group, constitute a denial of equal protection in violation of the Equal Protection Clause of the Fourteenth Amendment.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The constitutional and statutory provisions which are relevant to the decision of this case, and the pertinent text of which is set forth in the Appendix hereto, are as follows:

1. Amendment XIV, Section 1, of the *United States Constitution.*

2. *Minnesota Statutes* 125.12, 125.17, 125.19 to 125.26, 179.35 to 179.39, and 179.50 to 179.58.

STATEMENT OF THE CASE

Special School District No. 1 and members of the Minneapolis Federation of Teachers (MFT) and the City of Minneapolis Education Association (CMEA) began contract negotiations in the fall of 1969 pursuant to *Minnesota Statutes (M.S.)* 125.19 through 125.26 in an effort to reach agreement on the conditions of professional service for the school year 1970 to 1971. On April 8, 1970, the school district made its final offer to the teachers. On Thursday, April 9, 1970, certain members of MFT and CMEA participated in a strike against the school district. Some CMEA members also absented themselves from work purporting to take personal leave for the purpose of participation in "truth squads". On April 27, 1970, the strike was settled and the Minneapolis Public Schools were reopened on April 29, 1970. The settlement provided for a lump sum payment to striking teachers after expiration of the one year period during which *M.S.* 179.55 would prohibit compensation increases.

In early May, 1970, the Attorney General of the State of Minnesota commenced this action against the school

district and the two teachers organizations to declare the terms of the settlement to be invalid under the no strike provisions and penalties of *M.S.* 179.50 to 179.58, as applicable to public school teachers. On June 12, 1970, defendant, MFT submitted its answer raising constitutional issues of due process of law, equal protection of the law, freedom of speech, freedom to contract, and involuntary servitude. On June 30, 1970, a group of taxpayers was allowed to join the State as a party plaintiff and an issue raised by that group as to the appropriateness of the determination of the class of striking teachers was severed for trial as a separable issue. That issue is still pending trial. In July, 1970, all the parties to this action entered into a Stipulation of Facts in lieu of an actual court trial.

On August 26, 1970, the District Court of Hennepin County Minnesota ruled the settlement provisions to be in violation of Minnesota Statutes and found *M.S.* 179.51, 179.54 and 179.55 to be "constitutional in all respects".

In late August and early September, 1970 all the defendants appealed to the Minnesota Supreme Court. Petitioner again raised constitutional questions of due process and equal protection on that appeal. The Minnesota Supreme Court heard arguments on Friday, November 13, 1970, and on December 9, 1970, affirmed the opinion of the District Court holding the provisions of *M.S.* 179.51, 179.54, and 179.55 constitutional and applicable in all respects to this case. The Court further held that public employment cannot be considered a property right within the meaning of the due process and equal protection clauses of the United States Constitution.

A timely petition for rehearing of the due process and equal protection issues was filed on December 31, 1970 and

was denied by the Court on February 9, 1971. Accordingly, the case was remanded to the District Court of the State of Minnesota in order that the judgment of the Minnesota Supreme Court be carried out according to its terms.

REASONS FOR GRANTING THE WRIT

PRELIMINARY NOTE: Petitioners, public employees, are not asserting herein a right to strike or an unconstitutional denial of the power to strike. Rather Petitioners are raising other constitutional and due process issues concerning their status as public school teachers. The fact that they are denied the power to strike is mentioned only for the purpose of presenting to the Court all relevant substantive and procedural circumstances. Therefore, Petitioners hope this Court will feel that *Anderson Federation of Teachers, Local 519 v. School City of Anderson*, is not controlling, 251 N.E.2d 15, 254 N.E.2d 329 (rehearing denied), cert. denied (1970), 38 U.S.L.W. 3522, Case No. 1571 (1970).

Nor do Petitioners assert herein that procedural due process prevents dismissal of public employees except for "cause". Therefore, Petitioners hope this Court will feel that *Freeman v. Gould Special School Dist.*, 405 F.2d 1153, cert. denied 1969, 38 U.S.L.W. 3128, Case No. 122 (8th Cir. 1969), is also not controlling. The *Freeman* case is distinguishable from Petitioners on a number of points: None of the Freeman teachers had tenure, the context was confused by their attempt to raise the due process issue under the Civil Rights Act, and most importantly, because the argument of appellants in that case would have prevented dismissal of even a nontenured teacher except "for cause".

"And 'for cause' presupposes a right to hearing, notice, and appeal."

Freeman at page 1159.

Petitioners, on the other hand, are not requesting review of those hearing procedures required to dismiss a teacher for misconduct or other inadequacies. That is not an issue in this case. Instead, Petitioners are concerned with the adequacy of those statutory procedures established for dismissal of teachers who appear to be in violation of the no strike laws. (See Section 2.)

In section one, Petitioners also assert a constitutional due process right to certain minimal protections against arbitrary and capricious determinations of compensation for tenured and nontenured public school teachers. This is also distinguishable from *Freeman* because it does not concern discharge or termination, and is merely seeking to establish some reasonable protection for their employment interests, particularly in the case of tenured teachers.

Section 1. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF THE SUPREME COURT AND OTHER FEDERAL AND STATE COURTS AS TO WHETHER A PUBLIC EMPLOYEE HAS AN INTEREST IN HIS EMPLOYMENT WHICH SHOULD BE PROTECTED BY FEDERAL CONSTITUTIONAL DUE PROCESS SAFEGUARDS.

The decision below was based on the concept that public employees have no protectible interest in their employment. (Appendix page 89). But this Court has determined that

public employees have certain rightful interests in their employment which in turn require protection against arbitrary and capricious state actions. In *Wieman v. Updegraff*, 344 U.S. 183 (1952), this Court struck down a loyalty oath requirement because it based employability solely on the fact of membership in certain organizations. The opinion pointed out that membership itself may be innocent and held that the classification of innocent and guilty together was arbitrary. The Court held that "constitutional protection does extend to the public servant whose exclusion pursuant to a statute is patently arbitrary or discriminatory." 344 U.S. at 192. In *Slochower v. Board of Education*, 350 U.S. 551 (1956), this Court held that summary dismissal of a college professor by presuming his unfitness due to his refusal to testify before a state committee hearing, and without any further inquiry into his fitness or suitability, violated due process of law. And in *Cafeteria and Restaurant Workers v. McElroy*, 367 U.S. 886 (1961), this Court balanced the interest of the government in exercising totally unimpeded discretion versus the private interest affected by the exercise of that discretion. That opinion indicated a willingness to evaluate the private interest in terms of the commitment an employee makes to his work by education, training, purchase of a home, settling into a community, establishing a reputation in his work, and so forth.

In *Roth v. Board of Regents of State Colleges*, 310 F. Supp. 972 (1970), the Court held that dismissal of a nontenured professor without stated reason, notice, or a hearing, was not made under definite and ascertainable standards, was arbitrary, and was a denial of substantive and procedural due process of law. The *Roth* court engaged in a particularly lucid review of the *Cafeteria Workers* case, *supra*, and made the following observation:

> ". . . I am strenghtened by an awareness that this is consistent with the development of the law with respect to public employment generally. The time is past in which public employment is to be regarded as a privilege which may be extended upon any conditions which public officials may choose to impose."
>
> at page 979.

The rationale of the *Roth* opinion was applied to teachers in public elementary and secondary schools in the case of *Gouge v. Joint School District No. 1*, 310 F.Supp. 984 (1970).

See also "The Demise of the Right-Privilege Distinction in Constitutional Law": *81 Harvard L.R.* 1439, and the note concerning "Arbitrary Teacher Dismissal" at *44 N.Y.U. L. R.* 836.

The same dangers from which the courts have seen fit to protect public employees in termination cases are also present in salary disputes.

> "Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. While this is important in the case of documentary evidence, it is even more important where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be purgerers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy. We have formalized these protections and the requirements of confrontation and cross-examination. They have ancient roots." (Emphasis ours.)
>
> *Greene v. McElroy*, 360 U.S. 474 at 496 (1959).

A public employee who is denied reasonable compensation for his work is denied value differing only in degree from an employee who is unreasonably denied his job. Historically, it has not been sufficient to depend on politically and public-pressured government agencies to determine reasonable compensation. Their allegiance is to the taxpayer. Even when funds are available salary requirements have traditionally placed second to other budget items.

Petitioner is not asking that authority to determine compensation be removed from the public domain. Rather we ask that once the determination is made, dissatisfied employees should, as a minimum, be given the opportunity to subject that determination to a more impartial review, subject only to those standards of reasonableness commonly required of the actions of any administrative agency.

Public employment is no longer mere dedication to "community" which can be rewarded with token consideration. The governments of our states are our largest employers, and the families of public employees require the same necessities and desire the same luxuries as their private employee counterparts. Yet in a large majority of states they are denied the power to strike and they have no opportunity to influence their compensation except to discuss their demands with "management". A few states provide for binding arbitration or a limited right to strike but the rest provide the form of negotiations without the substance. Teachers have been denied the power to engage in those demonstrations of strength which have generally been found necessary to produce meaningful agreement.

The recent rash of public employee strikes, and the postal strike in particular, have revealed some revolting circumstances of treatment of public employees. There should no

longer be an assumption that government agencies will deal fairly with their employees. If any assumption can be made it is that public employee wages are often low and increase slowly. A tenured teacher, with many years service, who finds himself locked into a job and community, deserves, as a minimum, assurance that determination of his future compensation will always be subject to a review for reasonableness.

Admittedly a trial-type hearing is not conceivable in every case of government impairment of private interest. (See *Cafeteria Workers v. McElroy, supra,* at 894.) Nonetheless, where the employee's interest is great and where public employees have been denied the power to strike against unsatisfactory proposals, then due process, as a minimum, would seem to require some review by an impartial body. The purpose of the hearing would be to determine whether a reasonable basis exists for the last salary offer of the employer. This is all the more important where the state's interest is financial and represented by political persons.

In *Fairview Hospital Association, et al. v. Public Building Service and Hospital and Institutional Employees Union Local No. 113 AFL, et al.,* 241 Minn. 523 (1954), the Minnesota Supreme Court saw fit to require that charitable hospital workers be provided with a reasonable and substantial substitute remedy for denial of the right to strike. The *Fairview* court did not address itself to the relative status of charitable hospital workers and public employees, but *Minnesota Statute* 179.35, Subds. 2 and 3, defines that class as including many, perhaps largely, public employees. Whether or not the *Fairview* court felt it was discussing constitutional rules applicable to public employ-

ees, the concept of a substantial and reasonable substitute for an aggrieved interest is compatible with the precedents involving termination and discharge of public employees. The *Fairivew* court held that compulsory binding arbitration was a proper remedy. That is not necessarily to say that it is the only adequate remedy nor even the best remedy. An adequate remedy should be appropriate to the circumstances of the case, it should be available fully and freely to either party, and it should result in some determination of the issues. Due process would then seem to require at a minimum that a power of determination of reasonableness be placed in somebody other than the contestants.

No provision has been made in Minnesota for third party resolution of labor disputes or even for an impartial determination of the reasonableness of salary proposals. *Minnesota Statutes* 125.19 to 125.26 provide only that the parties shall "meet and confer" with respect to conditions of professional service and that they shall make an effort to reach an agreement. If the parties cannot agree, their dispute is submitted to an adjustment panel and fact-finding process. No provision is made for implementation of the findings and there is nothing to bind the school board to any resolution. Nowhere is any provision made for a hearing-type procedure conducted with that impartiality as with those hearing procedures required in the termination and discharge cases.

Furthermore, the statutory time sequence of the "meet and confer" statutes renders them impotent. If the teacher does not resign by April 1 then the continuing contract concept automatically binds him to the terms of the old contract for the next school year. *M.S.* 125.12 and 125.-

17. But in difficult situations the statutory bargaining procedures will not be completed by the first of April.

The statutory bargaining process normally procedes as follows. Negotiations for the next year's contract commonly begin between the teacher organizations and the school board in November or December of the current school year. *M.S.* 125.22. Negotiations are conducted under the "meet and confer" laws.

> "With respect to conditions of professional service (economic conditions) the parties shall meet and confer in an effort to reach agreement. With respect to all other matters, the parties shall meet and confer in order to afford a reasonable opportunity for the expression of views and the exchange of information."
>
> *M.S.* 125.23.

It is well recognized that the obligation to meet and confer is something less than the obligation to bargain in good faith. If the parties are unable to reach agreement, either one may request an adjustment panel prior to March 1 of the current school year. *M.S.* 125.25. Each party appoints one member to the panel and together try to agree upon a third. If they are unable to agree on a third member, application may be made to the Court upon five days notice in writing. The panel then meets within eight days after the appointment of a third member, and attempts to provide agreement by informal conferences between the parties.

> "If the results of the conferences are not satisfactory to all parties concerned, the panel, upon request of either party, shall afford the parties a full hearing, after which the panel shall make their findings, a copy of which shall be sent within fifteen days to each of

the parties involved and to the Commissioner of Education."

M.S. 125.25.

Nothing requires the school board to adopt the findings of the adjustment panel, but even more importantly, the adjustment process hardly begins by the middle of March of the current school year and it appears highly unlikely that its findings would be received by the parties prior to the first of April.

As a minimum, tenured teachers should be entitled to a review for reasonableness of school board salary determinations. Perhaps the concept of "adequate substitute remedy" even requires binding arbitration. And possibly even the employment interest recognized in nontenured teachers requires comparable protection. The *Freeman* court engaged in extensive discussion of "tenure" and "continuing contracts" (405 Fed.2d at pp. 1158, et seq.) and indicated that if appellants had these statutory rights then due process protection would be available. A large number of petitioners herein have both these rights. *M.S.* 125.17. State actions that adjudicate important statutory rights are subject to procedural due process review before such rights may be terminated. *Goldberg v. Kelly*, 397 U.S. 262 (1970). A teacher has a right not to be terminated if he did not violate *M.S.* 179.51, just as a welfare recipient has a right not to be terminated if he did not violate the qualifying provisions. The Minnesota teacher is equally subject to arbitrary treatment and may be equally in need of his paycheck. Therefore, the teacher's interest in his employment and compensation requires at least minimal due process remedies not presently available, and the no strike laws

and penalties in combination with the meet and confer laws, as interrelated sets of statutes, should be held an unconstitutional denial of due process.

Section 2. MINNESOTA STATUTES 179.51 THROUGH 179.58, AS APPLICABLE TO PUBLIC SCHOOL TEACHERS, RESULT IN A DENIAL OF THOSE CONSTITUTIONAL PROCEDURAL DUE PROCESS SAFEGUARDS REQUIRED BY THE SUPREME COURT.

Minnesota Statutes 179.51 through 179.58, commonly referred to as the "no strike laws", provide school boards with an incredible opportunity for arbitrary and capricious termination of employees and for discrimination towards groups of employees. As used in sections 179.51 to 179.58 the word "strike" means:

> ". . . the failure to report for duty, the willful absence from one's position, the stoppage of work, or the abstinence in whole or in part from the full, faithful and proper performance of the duties of employment, for the purpose of inducing, influencing or coercing a change in the conditions or compensation or the rights, privileges or obligations of employment."
>
> *M.S.* 179.51.

The penalty for striking is that:

> ". . . any public employee who violates the provisions of sections 179.51 to 179.58 shall thereby abandon and terminate his appointment or employment and shall no longer hold such position, or be entitled to any of the rights or emoluments thereof, except if appointed or reappointed as hereinafter provided."
>
> *M.S.* 179.54.

When any public employee violates these provisions, it is mandatory that his employment be immediately terminated. No provision is made by the no strike laws for review or a hearing to determine the fact of violation. The only material fact is whether he appeared to violate the statute. *Garavalia v. City of Stillwater,* 283 Minn. 335 (1969). It is evidently contemplated by the law, and is in fact the practice, that when a school board or other governing body determines that a strike has occurred, the employee's name somehow comes to be placed upon a list of allegedly striking employees and his employment and compensation are immediately terminated. Only after such termination is the employee entitled to request the opportunity to establish his innocence by means of hearings held pursuant to those procedures described in *M.S.* 179.56. But even these hearings are decided by the same school board that terminated the teachers. As a practical matter such hearings would require a few months to completion. In the interim, the employee receives no compensation. Petitioner submits that this case is directly controlled by *Goldberg v. Kelly, supra.* Perhaps this situation is even more compelling in requiring procedural due process protection since we are dealing with persons who are providing labor for their compensation, have committed themselves to public service, and have a judicially recognized interest in their employment.

The opportunity for discrimination in a statute of this kind is frightening. Without any hearing, review or appearance, an employee's name can be placed upon a list as having been absent from work with an intent to influence the conditions of employment and he will be immediately terminated. Furthermore, in this particular case, arising in the City of Minneapolis, one teacher group voted to strike and

simultaneously a second teacher group determined not to strike but to absent themselves from work for the alleged purpose of informing the public through "truth squads" of what they felt to be problems and inadequacies of the present school system. Were the truth squads striking? No provision is made for pre-termination procedure whereby the school board could distinguish between individual teachers and categorize those teachers pursuant to the definition of illegal striking activity. Here the school board determined that those absent teachers in truth squads were not striking. Without investigation into the motivation of the individual teachers one group was allowed to escape the penalties imposed upon the other for substantially the same activity. The Supreme Court has consistently found unconstitutional, those statutes which allow the state to discriminate against membership in certain organizations. *Shelton v. Tucker*, 364 U.S. 479 (1960), and *Keyishian v. Board of Regents*, 385 U.S. 589 (1967). In *Shelton*, even though the statute iself did not penalize membership in any group, the Court guessed the probable effect of the statute in discouraging controversial political association. By analogy, a teacher claiming membership in the more aggressive teacher organization could find himself arbitrarily penalized because of that association.

In *Goldberg*, this Court stated that welfare "benefits are a matter of statutory entitlement for persons qualified to receive them." 397 U.S. at 262. By analogy, a public school teacher, and particularly a tenured teacher, has a due process right not to be dismissed from his job, for alleged violation of the no strike law, without minimum procedural safeguards. It is important to recognize that we are not dealing with dismissal for matters which are generally held to be

within the proper discretion of an administrative agency. We are dealing with termination for alleged violations of a penal-type statute. Certainly minimal hearings would be no more burdensome upon the state than the imposition upon the teachers to go without compensation while post-termination hearings are being conducted. A teacher can be equally as dependent upon his salary for rent, subsistence, and other contract payments, and his credit could be equally as limited as a welfare recipient.

The *Goldberg* rationale requires, as a minimum, some pre-termination procedural safeguards that are not currently available under Minnesota law. Therefore, Petitioner requests that *Minnesota Statutes* 179.54 to 179.56 be held unconstitutional as adjudicating important interests and denying procedural due process.

Section 3. THE DECISION BELOW CONFLICTS WITH DECISIONS OF THE SUPREME COURT AS TO WHAT TYPES OF STATUTORY CLASSIFICATIONS WILL BE REGARDED AS A VIOLATION OF FEDERAL CONSTITUTIONAL EQUAL PROTECTION REQUIREMENTS.

For purposes of this discussion Petitioner can concede that the police powers of the state are validly exercised in denying certain employees the right to strike, that there is no protectible "interest" in public employment, and that the procedures established by the no strike laws do not violate constitutional due process safeguards.

Nonetheless, Petitioner presented to the lower courts herein a contrast in the treatment of public school teachers and charitable hospital workers which under authority of

the Supreme Court and even of the Minnesota Supreme Court, constitute arbitrary classification and treatment of the teachers so as to deny them constitutional equal protection of the laws.

Charitable hospital employees, a classification comprised largely of public employees, are governed by a different set of labor relations statutes than public school teachers. *M.S.* 179.35 to 179.39. The statutes are similar in that they both prohibit strikes, but no penalties are provided for charitable hospital employees and either the employee or the hospital may petition and avail themselves of mandatory arbitration procedures. Petitioner suggests that these two variations in treatment of charitable hospital workers as opposed to public school teachers constitutes a denial of equal protection to the teachers.

First, it would seem that all employees deemed important enough to the public to deny them power to strike are a "class" for the purpose of comparing legislative remedies for the resolution of disputes. Because teachers, charitable hospital workers, and other public employees have been grouped by the legislature as a class of people who are important to the health, safety and welfare of the public, thus they should have equally effective impasse procedures. But they do not. Teachers have only fact-finding and mediation, whereas charitable hospital employees have binding arbitration. It is not necessary and perhaps not even desirable that all public employees be entitled to binding arbitration. But if the legislature has provided a more effective remedy to one part of the class than another, then that part which has the less effective remedy has been denied equal protection. The legislature has a constitutional obligation to provide this more effective remedy to the entire

class if it provides it for any part thereof. Equality of benefit is required no less than equality of burden. See *16 Am. Jur.* 2d, Constitutional law §§ 488 and 526 to 532. Distinct classification of charitable hospital employees and teachers for certain objectives does not justify distinct treatment for all purposes. Each person wears many cloaks, and he may have many roles identical and many roles different from another. While it is always possible and oftentimes reasonable to distinguish between charitable hospital employees and public school teachers for certain cloaks they may wear, nevertheless their cloaks as employees governed by statutory impasse procedures seem to be identical. The state should have no valid interest in providing a more effective remedy to one group of employees than it does to another. There is a distinction between classification of employees for the purpose of protecting the public, and classification for the purpose of allocation of remedial measures for the employees. There must be a present or prospective state of facts upon which the classification could be sustained as reasonably tending to accomplish some valid legislative objective. *Benz v. Ericson,* 227 Minn. 1 (1948).

> "To operate uniformly a law must bring within its influence all who are in the same condition and treat them alike."
>
> *State v. Pehrson,* 205 Minn. 573, 577 (1939).

While the state may have had no obligation to provide any remedies at all. Nevertheless, having undertaken to do so, it had an obligation to treat all members of the class equally.

> ". . . but neither the power of the state absolutely to prohibit all traffic in alcoholic liquors nor the legisla-

> tive declaration that a permit constitutes a privilege and not property, renders inapplicable constitutional guarantees such as that of equal protection of the laws."
>
> *Benz v. Ericson, supra,* at 21.

Secondly, petitioner is unable to recognize any distinction between charitable hospital employees and public school teachers which would justify automatic and harsh penalties for striking teachers and no penalties for striking charitable hospital workers. This seems arbitrary. If there is a rationale for any group to be penalized, it would seem to require greater deterrants for the group who by striking creates a spontaneous emergency by its absence. Therefore, the charitable hospital workers more so than the teachers should be penalized. Again it seems that if the state feels a certain group of employees is important enough to the health, safety and welfare of the public to deny to those employees the power to strike, then the interest of the state in levying penalties should also be equal. It does not appear that these analyses involve second guessing the legislature, but rather petitioner suggests that these statutes have resulted from unrelated and piecemeal passage of special interest legislation affecting, for certain purposes, the same class of people and, by failing to coordinate and compare statutory provisions, resulting in arbitrary classifications.

The Minnesota Supreme Court's opinion failed to consider the different statutory provisions for charitable hospital workers and public employees and did not discuss these in analysis of Petitioner's equal protection arguments. Nowhere in the Court's discussion of the law are these provisions mentioned nor is there any indication that the effect

of these statutes was considered or compared with the statutory procedures available to the other group of public employees. But this is an important issue not only to thousands of employees in the State of Minnesota but in all likelihood it is a situation existing in many other states also.

Therefore Petitioner requests that *Minnesota Statutes* 125.19 to 125.26 and 179.54 to 179.56 be held unconstitutional for imposing unequal burdens and denying equal protection of the law.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Minnesota Supreme Court.

Respectfully submitted,

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May —, 1971.

CERTIFICATE OF SERVICE

I hereby certify that on this — day of May, 1971, three copies of the Petition for Writ of Certiorari were mailed, postage prepaid, to:

Mr. Norman L. Newhall
Attorney for Special School District No. 1 and its Board of Education
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Mr. Richard H. Murray
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Mr. John R. Kenefick
Office of Attorney General
160 State Office Building
St. Paul, Minnesota 55101

Mr. Earl H. A. Isensee
Attorney for Keith W. Davidson, et al.
4617 Golf Terrace
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counsel for the Respondents. I further certify that all parties required to be served have been served.

NEAL PETERSON
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APPENDIX

1. MINNESOTA STATUTES INVOLVED

a. PROCEDURES FOR TEACHERS, EXCEPT IN CITIES OF FIRST CLASS

125.12 Employment: contracts, termination

Subdivision 1. Teacher defined. A superintendent, principal, supervisor, and classroom teacher and any other professional employee required to hold a certificate from the state department shall be deemed to be a "teacher" within the meaning of this section.

Subd. 2. Hiring, dismissing. School boards shall hire or dismiss teachers at duly called meetings. Where a husband and wife, brother and sister, or two brothers or sisters, constitute a quorum, no contract employing a teacher shall be made or authorized except upon the unanimous vote of the full board. No teacher related by blood or marriage, within the fourth degree, computed by the civil law, to a board member shall be employed except by a unanimous vote of the full board. The employment shall be by written contract, signed by the teacher and by the chairman and clerk. Contracts for teaching or supervision of teaching can be made only with qualified teachers. Such contract shall specify the wages per year and the general assignment of the teacher.

Subd. 3. Probationary period. The first and second consecutive years of a teacher's first teaching experience in Minnesota in a single school district shall be deemed to be a probationary period of employment, and after completion thereof, the probationary period in each school district in which he is thereafter employed shall be one year.

A teacher who has complied with the then applicable probationary requirements in a school district prior to July 1, 1967, shall not be required to serve a new probationary period in the said district subsequent thereto. During the probationary period any annual contract with any teacher may or may not be renewed as the school board shall see fit; provided, however, that the school board shall give any such teacher whose contract it declines to renew for the following school year written notice to that effect before April 1. If the teacher requests reasons for any nonrenewal of a teaching contract, the school board shall give the teacher its reason in writing, including a statement that appropriate supervision was furnished describing the nature and the extent of such supervision furnished the teacher during his employment by the board, within ten days after receiving such request. The school board may, after a hearing held upon due notice, discharge a teacher during the probationary period for cause, effective immediately, under Minnesota Statutes, Section 123.14, Subdivision 4, or Section 123.35, Subdivision 5.

Subd. 4. Termination of contract after probationary period. A teacher who has completed his probationary period in any school district, and who has not been discharged or advised of a refusal to renew his contract pursuant to subdivision 3, shall have a continuing contract with such district. Thereafter, the teacher's contract shall remain in full force and effect, except as modified by mutual consent of the board and the teacher, until terminated by a majority roll call vote of the full membership of the board, upon one of the grounds specified in subdivision 6, or by the written resignation of the teacher, before April 1, or until the teacher is discharged pursuant to subdivision

8. Contracts for probationary teachers to be rehired and for teachers who have a continuing contract hereunder shall be submitted to those teachers no later than March 20th of the school year preceding the school year to which they apply. Before a teacher's contract is terminated by the board, the board shall notify the teacher in writing and state its ground for the proposed termination in reasonable detail together with a statement that the teacher may make a written request for a hearing before the board within 14 days after receipt of such notification. Within 14 days after receipt of this notification the teacher may make a written request for a hearing before the board and it shall be granted before final action is taken. If no hearing is requested within such period, it shall be deemed acquiescence by the teacher to the board's action. Such termination shall take effect at the close of the school year in which the contract is terminated in the manner aforesaid. Such contract may be terminated at any time by mutual consent of the board and the teacher and this section shall not affect the powers of the board to suspend, discharge, or demote a teacher under and pursuant to other provisions of law.

Subd. 5. Retirement. Notwithstanding the foregoing provisions, a board may provide by rule that its teachers shall be retired at age 65.

Subd. 6. Grounds for termination. A continuing contract may be terminated, effective at the close of the school year, upon any of the following grounds:

(a) Inefficiency;

(b) Neglect of duty, or persistent violation of school laws, rules, regulations, or directives;

(c) Conduct unbecoming a teacher which materially impairs his educational effectiveness;

(d) Other good and sufficient grounds rendering the teacher unfit to perform his duties; or

(e) Discontinuance of position, lack of pupils, or merger of classes caused by consolidation of districts or otherwise, provided that in the event of a consolidation of school districts, continuing-contract teachers on the staffs of participating school districts shall be retained on the staff of the consolidated district in positions for which they are qualified under state law and state board regulations to the extent that such positions exist.

A contract shall not be terminated upon one of the grounds specified in clauses (a), (b), (c), or (d), unless the teacher shall have failed to correct the deficiency after being given written notice of the specific items of complaint and reasonable time within which to remedy them.

Subd. 7. Suspension and leave of absence for health reasons. Affliction with active tuberculosis or other communicable disease, mental illness, drug or alcohol addiction, or other serious incapacity shall be grounds for temporary suspension and leave of absence while the teacher suffering from such disability. Unless the teacher consents, such action shall be taken only upon evidence that suspension is required from a physician who has examined the teacher. The physician shall be competent in the field involved and shall be selected by the teacher from a list of three provided by the school board, and the examination shall be at the expense of the school district. A copy of the report of the physician shall be furnished the teacher upon request. If the teacher fails to submit to the examina-

tion within the prescribed time, the board may discharge him, effective immediately. In the event of mental illness, if the teacher submits to such an examination and the examining physician's or psychiatrist's statement is unacceptable to the teacher or the board, a panel of three physicians or psychiatrists shall be selected to examine the teacher at the board's expense. The board and the teacher shall each select a member of this panel, and these two members shall select a third member. The panel shall examine the teacher and submit a statement of its findings and conclusions to the board. Upon receipt and consideration of the statement from the panel the board may suspend the teacher. The board shall notify the teacher in writing of such suspension and the reasons therefor. During the leave of absence the teacher shall be paid sick leave benefits by the district up to the amount of his unused accumulated sick leave, and after it is exhausted, the district may in its discretion pay him additional benefits. The teacher shall be reinstated to his position upon evidence from such a physician that he has made sufficient recovery and is capable of resuming performance of his duties in a proper manner. In the event that the teacher does not qualify for reinstatement within twelve months after the date of suspension, his continuing disability may be a ground for discharge under subdivision 8.

Subd. 8. Immediate discharge: A school board may discharge a continuing-contract teacher, effective immediately, upon any of the following grounds:

(a) Immoral conduct, insubordination, or conviction of a felony;

(b) Conduct unbecoming a teacher which requires the

immediate removal of the teacher from his classroom or other duties;

(c) Failure without justifiable cause to teach without first securing the written release of the school board;

(d) Gross inefficiency which the teacher has failed to correct after reasonable written notice;

(e) Willful neglect of duty; or

(f) Continuing physical or mental disability subsequent to a twelve months leave of absence and inability to qualify for reinstatement in accordance with subdivision 7.

Prior to discharging a teacher the board shall notify the teacher in writing and state its ground for the proposed discharge in reasonable detail. Within ten days after receipt of this notification the teacher may make a written request for a hearing before the board and it shall be granted before final action is taken. The board may, however, suspend a teacher with pay pending the conclusion of such hearing and determination of the issues raised therein after charges have been filed which constitute ground for discharge.

Subd. 9. Hearing procedures. Any hearing held pursuant to Laws 1967, chapter 890 shall be held upon appropriate and timely notice to the teacher, and shall be private or public at the discretion of the teacher. At the hearing, the board and the teacher may each be represented by counsel at its or his own expense, and such counsel may examine and cross-examine witnesses and present arguments. The board shall first present evidence to sustain the grounds for termination or discharge and then receive evidence presented by the teacher. Each party may

then present rebuttal evidence. Dismissal of the teacher shall be based upon substantial and competent evidence in the record. All witnesses shall be sworn upon oath administered by the presiding officer of the board. The clerk of the board shall issue subpoenaes for witnesses or the production of records pertinent to the grounds upon the request of either the board or the teacher. The board shall employ a court reporter to record the proceedings at the hearing, and either party may obtain a transcript thereof at its own expense.

Subd. 10. Decision. After the hearing, the board shall issue a written decision and order. If the board orders termination of a continuing contract or discharge of a teacher, its decision shall include findings of fact based upon competent evidence in the record and shall be served on the teacher, accompanied by an order of termination or discharge, prior to April 1, in the case of a contract termination, or within ten days after conclusion of the hearing in the case of a discharge. If the decision of the board or of a reviewing court is favorable to the teacher, the proceedings shall be dismissed and the decision entered in the board minutes, and all references to such proceedings shall be excluded from the teacher's record file.

Subd. 11. Judicial review. The pendency of judicial proceedings shall not be ground for postponement of the effective date of the school board's order, but if judicial review eventuates in reinstatement of the teacher, the board shall pay the teacher all compensation withheld as a result of the termination or dismissal order.

Subd. 13. Exception. This section shall not apply to any district in a city of the first class.

Amended by Laws 1963, c. 450, § 1; Laws 1967, c. 890, § 1, eff. July 1, 1967; Laws 1969, c. 781, § 1, eff. May 28, 1969.

b. PROCEDURES FOR TEACHERS IN CITIES OF FIRST CLASS

125.17 Teacher tenure act; cities of the first class; definitions

Subdivision 1. Words, terms, and phrases. Unless the language or context clearly indicates that a different meaning is intended, the following words, terms, and phrases, for the purposes of the following subdivisions in this section shall be defined as follows:

(a) Teachers. The term "teacher" includes every person regularly employed, as a principal, or to give instruction in a classroom, or to superintend or supervise classroom instruction, or as placement teacher and visiting teacher. Persons regularly employed as counselors and school librarians shall be covered by these sections as teachers if certificated as teachers or as school librarians.

(b) School board. The term "school board" includes a majority in membership of any and all boards or official bodies having the care, management, or control over public schools.

(c) Demote. The word "demote" means to reduce in rank or to transfer to a lower branch of the service or to a position carrying a lower salary or compensation.

Subd. 2. Probationary period; discharge or demotion. All teachers in the public schools in cities of the first class during the first three years of consecutive employment shall be deemed to be in a probationary period of employment

during which period any annual contract with any teacher may, or may not, be renewed as the school board shall see fit. The school board may, during such probationary period, discharge or demote a teacher for any of the causes as specified in this code. A written statement of the cause of such discharge or demotion shall be given to the teacher by the school board at least 30 days before such removal or demotion shall become effective, and the teacher so notified shall have no right of appeal therefrom.

Subd. 3. Period of service after probationary period; discharge or demotion. After the completion of such probationary period, without discharge, such teachers as are thereupon re-employed shall continue in service and hold their respective position during good behavior and efficient and competent service and shall not be discharged or demoted except for cause after a hearing.

Any probationary teacher shall be deemed to have been re-employed for the ensuing school year, unless the school board in charge of such school shall give such teacher notice in writing before April 1 of the termination of such employment. In event of such notice the employment shall terminate at the close of the school sessions of the current school year.

Subd. 4. Grounds for discharge or demotion. Causes for the discharge or demotion of a teacher either during or after the probationary period shall be:

(1) Immoral character, conduct unbecoming a teacher, or insubordination;

(2) Failure without justifiable cause to teach without first securing the written release of the school board having the care, management, or control of the school in which the teacher is employed;

(3) Inefficiency in teaching or in the management of a school;

(4) Affliction with active tuberculosis or other communicable disease shall be considered as cause for removal or suspension while the teacher is suffering from such disability; or

(5) Discontinuance of position or lack of pupils.

Subd. 5. Hearing of charges against teacher. The charges against a teacher shall be in writing and signed by the person making the same and then filed with the secretary or clerk of the school board having charge of the school in which the teacher is employed. Such school board before discharging or demoting a teacher shall then accord the teacher against whom such charges have been filed a full hearing and give to the teacher at least ten days' notice in writing of the time and place of such hearing; such notice may be served personally or sent by registered mail addressed to such teacher at his last known post-office address; provided, that if the charge be made by any person not in connection with the school system the charge may be disregarded by such school board. Upon such hearing being held such school board shall hear all evidence that may be adduced in support of the charges and for the teacher's defense thereto. Either party shall have the right to have a written record of the hearing at the expense of the board and to have witnesses subpoenaed and all witnesses so subpoenaed shall be examined under oath. Any member of the school board conducting such a hearing shall have authority to issue subpoenas and to administer oaths to witnesses.

Subd. 6. Counsel; examination of witnesses. Each

party appearing before the school board shall have the right to be represented by counsel, and such counsel may examine and cross-examine witnesses and present arguments.

Subd. 7. Hearings. All hearings before the school board shall be private or may be public at the decision of the teacher against whom such charges have been filed.

Subd. 8. Decision, when rendered. Such hearing must be concluded and a decision in writing, stating the grounds on which it is based, rendered within 25 days after giving of such notice. Where the hearing is before a school board the teacher may be discharged or demoted upon the affirmative vote of a majority of the members of the school board. If the charges, or any of such, are found to be true, the school board conducting the hearing shall discharge, demote, or suspend the teacher, as seems to be for the best interest of the school. No teacher shall be discharged for either of the causes specified in subdivision 4, clause (3), except during the school year, and then only upon charges filed at least four months before the close of the school sessions of such school year. As amended Laws 1961, c. 720, § 1.

Subd. 9. Charges expunged from records. In all cases where the final decision is in favor of the teacher the charge or charges shall be physically expunged from the records.

Subd. 10. Suspension pending hearing; salary. Upon the filing of charges against a teacher, the school board may suspend the teacher from regular duty. If, upon final decision, the teacher is suspended or removed, the school board may in its discretion determine the teacher's salary

or compensation as of the time of filing the charges. If the final decision is favorable to the teacher there shall be no abatement of salary or compensation.

Subd. 11. Services terminated by discontinuance or lack of pupils; preference given. Any teacher whose services are terminated on account of discontinuance of position or lack of pupils shall receive first consideration for other positions in the district for which she is qualified. In the event it becomes necessary to discontinue one or more positions, in making such discontinuance, teachers shall be discontinued in any department in the inverse order in which they were employed. Laws 1959, Ex. Sess., c. 71, art. VI, § 17.

c. PROCEDURES FOR ORGANIZATION, REPRESENTATION, AND MEET AND CONFER LAWS

125.19 Organization and representation; statement of policy

Teaching is recognized as a profession and the relationship between the school boards of the state and the teachers employed by them is hereby recognized as a professional relationship. The laws of the state have vested in the elected school board members the full power to manage, control and direct the operations of the public schools. It is acknowledged that teachers are academically trained and are dedicated to a high calling which puts the well being of their students foremost. Teachers share in the overall concern for public education. It is, therefore, the policy of this state to encourage closer cooperation between school boards and certificated school personnel by providing teacher participation in discussions leading to the formulation and implementation of public education policies affecting

the conditions of their employment and the practice of their profession.

Laws 1967, c. 633, § 1, eff. May 23, 1967.

125.20 Definitions

Subdivision 1. For the purpose of sections 125.19 to 125.26 the terms defined in this section have the meanings ascribed to them.

Subd. 2. "Teacher" means any certificated person defined in section 125.12, Subdivision 1, except superintendent.

Subd. 3. "Teacher organization" means any organization or labor union or part of such organization which includes only teachers of a public school as members.

Subd. 4. "Teacher organization member" shall be any teacher employed by the school district who upon payment of any prescribed dues shall have full rights and privileges of membership in the teacher organization on the date of verification and is in all respects a member in good standing.

Subd. 5. "Conditions of professional services" means economic aspects relating to terms of employment, but does not mean educational policies of the district.

Laws 1967, c. 633, § 2, eff. May 23, 1967.

125.21 Right to form or join organizations

Subdivision 1. Teachers shall have the right to form and join teacher organizations, and shall have the right not to form or join such organizations. It is unlawful to discharge or otherwise discriminate against any teacher for

the exercise of such rights. It is unlawful for any person or group of persons, either directly or indirectly, to intimidate or coerce any teacher to join or to refrain from joining any teacher organization.

Subd. 2. Nothing contained in sections 125.19 to 125.26 shall be construed to limit, impair or affect the right of any teacher to the expression or communication of a view, grievance, complaint or opinion on any matter to the board regardless of the existence of a teacher organization or council in the district, so long as the same is not designed to and does not interfere with the full and faithful and proper performance of the duties of employment; nor shall it be construed to require any teacher to perform services against his will.

Laws 1967, c. 633, § 3, eff. May 23, 1967.

125.22 Teacher organization recognition

Subdivision 1. The school boards of the state shall grant recognition to teacher organizations which request such recognition according to the requirements of this section.

Subd. 2. Where a single teacher organization has as members teachers of the district, the board shall recognize that organization as the representative of those teachers.

Subd. 3. When more than one teacher organization has as members teachers employed in the district, the board shall grant recognition to a committee of five teachers selected by these organizations on a proportionate basis determined by membership. The committee shall be known as the teachers' council and consist only of teachers employed by the district. Each teacher organization shall be entitled

to appoint such number to the council which bears, as nearly as practicable, the same ratio as the total membership of the appointing organization bears to the combined membership of teacher organizations to be represented on the council. Recognition shall not, however, preclude any rights of any teacher as provided in section 125.21, subdivision 2.

Subd. 4. Each teacher organization shall adopt procedures for selecting its proportionate share of members of the teacher council providing that such members shall be selected no later than October 31 of each school year. Within ten days after October 31, the members of the teachers' council shall meet and select a chairman from among its own members, and thereafter such teachers' council shall be legally constituted to meet and confer at reasonable times with the school board or committee thereof. The council shall be empowered to adopt rules and procedures for its own operation, provided, however, no rule or procedure which precludes any council members' attendance at any meeting between the council and the board shall be valid. Any teacher organization entitled to membership on the council which fails to name members by October 31 or refrains from participating on the council shall forfeit the right to membership on the council until the following October 31.

Laws 1967, c. 633, § 4, eff. May 23, 1967.

125.23 Duty to meet and confer

The school board or a committee thereof which may include its representative shall meet and confer at reasonable times with the recognized teacher organization or teachers' counsel which may include their representative regarding conditions of professional service, as well as educa-

tional and professional policies, relationships, grievance procedures, and other matters as apply to teachers. With respect to conditions of professional service the parties shall meet and confer in an effort to reach agreement. With respect to all other matters, the parties shall meet and confer in order to afford a reasonable opportunity for the expression of views and the exchange of information. When agreement is reached concerning conditions of professional services the board shall implement the agreement in the form of a resolution or by direction to any administrative officer as may be appropriate.

Laws 1967, c. 633, § 5, eff. May 23, 1967.

125.24 School board policies

Each school board shall adopt, in a manner consistent with sections 125.19 to 125.26, policy guides establishing procedures for, but not limited to, meeting and conferring and for verifying the number of teachers employed by the school district who are members in good standing of teacher organizations on the date of verification. Such verification shall be made by the president or other authorized officer of the teacher organization and on his signature.

Laws 1967, c. 633, § 6, eff. May 23, 1967.

125.25 Adjustment panel

Subdivision 1. If any matter regarding conditions of professional service is not agreed upon through meetings with the school board, the school board shall set up an adjustment panel at the request of the recognized teacher organization, teachers' council, or at its own instance, provided such request is made prior to March 1 of each school year.

Subd. 2. One of the panel members shall be selected by the recognized teacher organization or council if one exists pursuant to section 125.22, one by the school board, and the two so selected shall select a third member. If after five days the two members cannot agree upon the third member, the senior or presiding judge of the district court of the county in which the district's main administration office is located shall appoint such third member. Such appointment shall be made upon application by either of the appointed members in writing by giving five days' notice thereof in writing to the other member. If one of the parties fails or refuses to appoint a member to the panel, such member shall be appointed by the senior or presiding judge of the district court in the same manner as the third member is appointed, upon application by a panel member in writing upon five days' notice in writing to the party so failing or refusing.

Subd. 3. Each member of the panel shall be compensated for all necessary expenses by the party he represents. The third member of the panel shall be compensated equally by the parties involved at the rate of $50 for each day or part of a day the hearing is held, and all other necessary expenses except as may be otherwise agreed to by the parties.

Subd. 4. The panel shall meet within eight days after the appointment of a third member. The parties shall attempt to provide agreement of matters relating to conditions of professional service through informal conferences. If agreement can be found through conferences between the parties with the aid and assistance of the adjustment panel prior to April 1 of each school year, it shall be so

adjusted and the school board shall implement the agreement in the form of a resolution. If the results of the conferences are not satisfactory to all parties concerned, the panel, upon request of either party, shall afford the parties a full hearing, after which the panel shall make their findings, a copy of which shall be sent within 15 days to each of the parties involved and to the commissioner of education.

Laws 1967, c. 633, § 7, eff. May 23, 1967.

125.26 School board authority and duties, limitations

Subdivision 1. Nothing in sections 125.19 to 125.26 shall be construed to diminish or enlarge the authority of school boards as expressly granted to the school boards by the legislature in chapters 120 to 129 inclusive.

Subd. 2. Only those duties of the school board as expressly stated in sections 125.23, 125.24 and 125.25 are hereby conferred upon the school boards by sections 125.19 to 125.26 and nothing in sections 125.19 to 125.26 shall be construed so as to require school boards to do other than expressly stated in said sections.

Laws 1967, c. 633, § 8, eff. May 23, 1967.

d. PUBLIC EMPLOYEE STATUTES APPLICABLE TO TEACHERS

179.51 Strikes by public employees

No person holding a position by appointment or employment in the government of the State of Minnesota, or in the government of any one or more of the political subdivisions thereof, or in the service of the public schools, or of the State University, or in the service of any authority,

commission, or board, or any other branch of the public service, hereinafter called a "public employee" shall strike, or participate in a strike. As used in sections 179.51 to 179.58 the word "strike" shall mean the failure to report for duty, the wilful absence from one's position, the stoppage of work, or the abstinence in whole or in part from the full, faithful and proper performance of the duties of employment, for the purpose of inducing, influencing or coercing a change in the conditions or compensation or the rights, privileges or obligations of employment.

179.54 Violation, penalty

Notwithstanding any other provision of law, any public employee who violates the provisions of sections 179.51 to 179.58 shall thereby abandon and terminate his appointment or employment and shall no longer hold such position, or be entitled to any of the rights or emoluments thereof, except if appointed or reappointed as hereinafter provided. [1951, c. 146 s. 4]

179.55 Re-employment of striking employee

Notwithstanding any other provision of law, a person knowingly violating the provisions of sections 179.51 to 179.58 may, subsequent to such violation, be appointed, or reappointed, employed or re-employed as a public employee but only upon the following conditions: (a) his compensation shall in no event exceed that received by him immediately prior to such violation, (b) the compensation of such person shall not be increased until after the expiration of one year from such appointment or reappointment, employment or re-employment, and (c) the said person shall be on probation for two years with respect to such civil service status, tenure of employment, or contract of

employment, as he may have theretofore been entitled. [1951 c. 146 s. 6]

179.56 Employee entitled to establish fact of no violation

Any public employee, upon request, shall be entitled, as hereinafter provided to establish that he did not violate the provisions of sections 179.51 to 179.58. Such request must be filed in writing with the officer or body having the power to remove such employee, within ten days after regular compensation of such employee has ceased, whereupon such officer, or body, shall within ten days commence a proceeding at which such person shall be entitled to be heard for the purpose of determining whether the provision of sections 179.51 to 179.58 have been violated by such public employee, and if there be laws and regulations establishing proceedings to remove such public employee the hearing shall be conducted in accordance therewith. Such proceedings shall be undertaken without unnecessary delay. [1951 c. 146 s. 6]

e. CHARITABLE HOSPITAL WORKER LAWS

179.35 Definitions; Hospital No Strike and Arbitration Act

Subdivision 1. Unless the language or context clearly indicates that a different meaning is intended, the following words, terms and phrases, for the purposes of sections 179.35 to 179.39, shall be given the meanings subjoined to them.

Subd. 2. "Charitable hospital" includes all state, university, county and municipal hospitals and any hospital no part of the net income of which inures to the benefit of any private member, stockholder, or individual.

Subd. 3. "Hospital employee" includes any person employed in any capacity by a charitable hospital, except an employee whose services are performed exclusively in connection with the operation of a commercial or industrial enterprise owned or operated by the charitable hospital for the production of profit, irrespective of the purposes to which such profit may be applied, and not engaged in any activity affecting the essential functions of the hospital.

Subd. 4. "Labor dispute" includes any controversy concerning employment, tenure, conditions, or terms of employment or concerning the association or right of representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms, tenure, or other conditions of employment, regardless of whether or not the relationship of employer and employee exists as to the disputants.

Subd. 5. "Strike" means the temporary stoppage of work by the concerted action of two or more hospital employees as a result of a labor dispute.

Subd. 6. "Lockout" means the refusal of a charitable hospital to furnish work to employees as a result of a labor dispute. Laws 1947, c. 335, § 1.

179.36 Strikes prohibited

It is unlawful for any hospital employee or representative of the employee, as defined in Minnesota Statutes 1945, Section 179.01, Subdivision 5 to encourage, participate in, or cause any strike or work stoppage against or directly involving a charitable hospital. Laws 1947, 335, § 2.

179.37 Lockouts prohibited

It is contrary to public policy and is hereby declared to

be unlawful for any charitable hospital to institute, cause, or declare any lockout. Laws 1947, c. 335, § 3.

179.38 Arbitration mandatory.

In the event of the existence of any labor dispute which cannot be settled by negotiation between the charitable hospital employers and their employees, either such employers or employees may petition and avail themselves of the provisions of sections 179.01 to 179.17, insofar as sections are not inconsistent with the provisions of sections 179.35 to 179.39. If such dispute is not settled within ten days after submission to mediation, any unsettled issue of maximum hours of work and minimum hourly wage rates shall, upon service of written notice by either party upon the other party and the director of medication services, be submitted to the determination of a board of arbitrators whose determination shall be final and binding upon the parties. The board of arbitrators shall be selected and proceed in the following manner, unless otherwise agreed between the parties: the employers shall appoint one arbitrator, the employees shall appoint one arbitrator, and the two arbitrators so chosen shall appoint a third arbitrator who shall act as chairman and who shall receive reasonable compensation for his work; but if said arbitrators are unable to agree upon the appointment of such third arbitrator within five days after submission to arbitration, the governor shall submit five names to the parties and the parties shall select the third arbitrator, who shall act as chairman, from the five submitted by the governor. The selection of the third arbitrator shall be by the process of elimination, with the parties taking turns at striking names from the list of five submitted by the governor, until only one name remains. If the parties are unable to agree with respect to which

party shall take the first turn for the purpose of striking a name, it shall be decided by the flip of a coin. Each party shall be responsible for compensating the arbitrator of their choice, and the parties shall share equally the compensation paid to the third arbitrator. The board of arbitrators shall serve as a temporary arbitration tribunal and shall have the powers provided for commissioners under Minnesota Statutes 1945, Section 179.08. The board of arbitrators shall make its determination with all due diligence and shall file a copy of its report with the director of mediation services. Amended by Laws 1969, c. 1129, art. II, § 19, eff. July 1, 1969.

179.39 Sections not applicable

The provisions of Minnesota Statutes 1945, Sections 185.02 to 185.19, shall not apply in the case of a threatened or existing strike or other work stoppage by hospital employees or in the case of a lockout by a charitable hospital, and such threatened or existing strike or other work stoppage or lockout may be enjoined by a court of equity. Laws 1947, c. 335, § 5.

2. OPINION OF MINNESOTA DISTRICT COURT

STATE OF MINNESOTA — DISTRICT COURT
County of Hennepin — 4th Judicial District

DOUGLAS M. HEAD, Attorney General, State of Minnesota; KEITH W. DAVIDSON, KATHERINE V. HOWARD, HARVEY A. RING and BETTY K. ROBB, on behalf of themselves and all other taxpayers and residents of Special School District No. 1 of the City of Minneapolis,

Plaintiffs,

vs.

SPECIAL SCHOOL DISTRICT NO. 1 and its Board of EDUCATION; MINNEAPOLIS FEDERATION OF TEACHERS, LOCAL NO. 59; CITY OF MINNEAPOLIS EDUCATION ASSOCIATION, and JOHN DOE,

Defendants.

FINDINGS OF FACT, CONCLUSIONS OF LAW, ORDER FOR JUDGMENT AND DECREE

File No. 666936

The above-entitled matter came on for trial before the undersigned judge of the District Court on July 27, 1970. The plaintiff, Douglas M. Head, Attorney General, was represented by John R. Kenefick, Assistant Solicitor General. The plaintiffs Keith W. Davidson, Katherine V. Howard, Harvey A. Ring and Betty K. Robb, on behalf of themselves and all other taxpayers and residents of Special School District No. 1 of the City of Minneapolis, were represented by Earl H. A. Isensee, Sr., and Earl H. A. Isen-

see, Jr. The defendant Special School District No. 1 and its Board of Education was represented by Mr. N. L. Newhall of Lindquist and Vennum. The defendant Minneapolis Federation of Teachers, Local No. 59, was represented by Thomas W. Wexler of Helgeson, Peterson, Engberg & Spector. The defendant City of Minneapolis Education Association was represented by Richard H. Murray of Oppenheimer, Brown, Wolff, Leach and Foster.

The Court received into evidence a stipulation of facts executed by all of the parties to these proceedings. The Court further heard oral arguments by the various parties. Briefs and reply briefs were also submitted by various parties. Based upon the records, files and proceedings herein, the Court hereby makes the following findings of fact, conclusions of law, order for judgment and decree:

FINDINGS OF FACT

1. Plaintiff Douglas M. Head is the duly elected and acting Attorney General of the State of Minnesota.

2. Keith W. Davidson, Katherine V. Howard, Harvey A. Ring, and Betty K. Robb are residents and taxpayers living within the boundaries of Special School District No. 1 and are appearing on behalf of themselves and all other taxpayers and residents of Special School District No. 1 in the City of Minneapolis.

3. Special School District No. 1 exists under and by virtue of Laws 1959, Ch. 462, as amended, and has all the rights, privileges, duties and obligations of an independent school district as provided for by the laws of the State of Minnesota. Said defendant Special School District No. 1 is governed by defendant Board of Education, which Board

of Education has the care, management, and supervision, conduct and control of said Special School District No. 1 as its responsibility.

4. Defendant Minneapolis Federation of Teachers, Local No. 59, is a voluntary union of teachers and others employed by defendant Board of Education.

5. Defendant City of Minneapolis Education Association is a voluntary association of teachers and others employed by defendant Board of Education.

6. Defendant John Doe is a fictitious defendant who represents an unnamed, qualified teacher employed by defendant Special School District No. 1 by and through defendant Board of Education for the school year 1969-70. Absent unforeseen termination, the said John Does will continue in said employment for school year 1970-71. The said John Doe is a representative of the class of striking teachers composed of the fictitious individual and all other teachers employed by and through defendant Board of Education who are administratively found to have been on strike or participants in a strike commencing on April 9, 1970, against said Board of Education, pursuant to procedures which the Board of Education claims to be in accord with Minnesota Statutes 1969, Sec. 179.56.

7. That the efforts of the defendant Special School District No. 1 and the defendant teachers to operate under the meet and confer law are set forth in the stipulation of facts in evidence herein, and by reference Paragraphs 7, 8, 9, 10, 11 and 12 of said stipulation are incorporated by reference in these findings of fact.

8. The class of striking teachers as determined by the

School Board under the procedures prescribed by it numbers approximately 1,650. A list of those teachers has been filed with the Court and is a part of these proceedings.

9. On April 6, 1970, the members of defendant Minneapolis Federation of Teachers, Local No. 59, by majority vote, determined to absent themselves from work for the purpose of influencing conditions of employment, commencing April 9, 1970.

10. On April 8, 1970, the defendant City of Minneapolis Education Association applied to the School Board for personal leave on behalf of all of its members for April 9 and 10, 1970. The Board of Education of defendant Special School District No. 1 rescinded and canceled the personal leave policy, and notified defendant City of Minneapolis Education Association.

11. On April 9, 1970, certain members of defendant Minneapolis Federation of Teachers, Local No. 59, did absent themselves from work for the purpose of influencing conditions of employment and did strike and participate in a strike against the said Special School District No. 1 and its Board.

12. Defendant City of Minneapolis Education Association determined by majority vote not to join in the strike. Despite this action, some of its individual members did absent themselves from work commencing April 9, 1970, for the purpose of influencing conditions of work and did strike and participate in a strike against said Special School District No. 1 and its Board. Other City of Minneapolis Education Association members absented themselves and purported to take personal leave for these two days.

13. There are 3,400 teachers employed by the defendant Special School District No. 1. On Thursday, April 9, 1970, and Friday, April 10, 1970, about 1,200 teachers were in attendance. Thus, approximately 2,200 teachers were absent from work on those days. Although most of the schools were open, active strike bannering and picketing took place at all schools.

14. Defendant Special School District No. 1, by and through its superintendent, determined that all teachers who absented themselves from work on Friday, April 10, 1970, were on strike and that the provisions of Minnesota Statutes, 1969, Sec. 179.54 were applicable. Teachers who were present on April 10, 1970, were not treated as having been on strike, regardless of whether they were or were not in attendance on April 9, 1970. Thereafter, certain teachers filed with defendant Board of Education, pursuant to Minnesota Statutes 1969, Sec. 179.56, written requests to establish that said teachers had not violated the provisions of Secs. 179.51 to 179.58.

15. A large number of teachers remained on strike throughout the week of April 13 through 17, 1970. Under these circumstances, the school administration determined to close the schools due to the possible danger to life and property of the students, teachers, and the public generally. The schools thereafter remained closed by various administrative actions, ratified by the Board from time to time, from April 13 to April 29, 1970.

16. After a writ of temporary injunction in Case Nos. 666239 and 666262 of this Court was issued and served upon the defendant Minneapolis Federation of Teachers, Local No. 59, and its officers and defendant City of Min-

neapolis Education Association and its officers on April 20, 1970, there was thereafter no general picketing of the schools.

17. Discussions and negotiations and meet and confer proceedings as provided by statute took place between the Teachers Council and the Board from the commencement of the strike until April 20, 1970. On April 20, 1970, negotiations were broken off because the Teachers Council rejected the Board's final offer of a salary and fringe benefit schedule. From April 20th on, the Board conducted no further negotiations with the Teachers Council, but did remain in informal contact with the leaders of the two organizations.

18. After negotiations with the Teachers Council had broken off, the Board had no idea as to which teachers would return to work when the schools reopened. The Board was also concerned about possible violence if some schools opened without adequate staff to maintain discipline. Accordingly, on April 21, 1970, it mailed to all teachers the final salary offer made to the Teachers Council together with certain policy language which had been worked out for adoption for the Board. On April 22, 1970, it mailed to every teacher a request that he advise the Board of his intent to return to his teaching duties upon the reopening of the schools.

19. By April 25, 1970, about 1,500 teachers had indicated their intent to return to work, although many of these qualified their intent by stating they would return only if they deemed it safe to do so. Because this response was less than one-half of the full complement of teachers, the Board was concerned at the prospect of attempting to reopen the schools.

20. From the discussions with defendant Minneapolis Federation of Teachers, Local No. 59, over the weekend of April 25 and 26, 1970, the Board concluded that the Minneapolis Federation of Teachers, Local No. 59 leadership would not recommend that its striking teachers return to work without assurance of reimbursement for money lost through nonpayments since April 9, 1970, and further assurance that after a year elapsed they would receive a payment of payments equal to the money lost during the 1970-71 school year through application of the statutory restriction against increased pay for services performed within a year following the strike. Further, the Board concluded that no substantial number of Minneapolis Federation of Teachers teachers would return without the recommendation of their leadership and further that many City of Minneapolis Education Association teachers would fail to return unless assured that the schools would have nearly complete staffing so as to be safe for all concerned.

21. At this point in time the Board felt it could not reopen the schools with the very limited staff as indicated, and that the strike had to be resolved in some way. On April 24, 1970, the Board was advised by the Minnesota Commissioner of Education, Howard B. Cosmey, that its eligibility for State aids was in danger if the schools did not open in the very near future.

22. Faced with this situation, the Board on April 27, 1970, reached agreement with defendant Minneapolis Federation of Teachers, Local No. 59, that it would pass the resolutions which are Exhibits A and B, attached to plaintiff's complaint, and reached agreement with defendant City of Minneapolis Education Association that it would pass the resolution which is Exhibit C, attached to plaintiff's com-

plaint, in return for favorable action by defendant Minneapolis Federation of Teachers, Local No. 59, and defendant City of Minneapolis Education Association leadership recommending that the respective members return to teaching on April 29, 1970. The Board passed the resolutions, the leadership fulfilled its recommendations, and the schools were reopened on April 29, 1970. All these resolutions are applicable without regard to teacher organization membership.

23. Pursuant to the resolutions mentioned, the Board has already 1) rehired the striking teachers under the provisions of Minnesota Statutes 1969, Sec. 179.55 and 2) paid to each of said striking teachers for seven days (April 20, 21, 22, 23, 24, 27 and 28), during the strike period, an amount equal to their regular compensation for said days.

24. Also pursuant to said resolutions, the Board intends to pay to each of the striking teachers as part of his or her last pay check for the school year 1970-71 an amount equivalent to the difference in pay between what said teacher was paid during the 1970-71 school year, and what he would have been paid during the school year if he had been employed at the appropriate step and lane of the 1970-71 salary schedule.

25. Pursuant to the provisions of the aforementioned Exhibit C to the plaintiff's complaint, defendant Special School District No. 1 has conducted hearings with regard to a number of teachers who were absent on April 10, 1970, for the purpose of determining whether any of said teachers had by their absence violated the provisions of Minnesota Statutes 1969, Sec. 179.51. Said hearings have result-

ed in administrative determinations by the Board of the defendant Special School District No. 1 that certain of those teachers had in fact been in violation of the "No-Strike" Law while others had not. Intervenors have challenged the validity of these determinations by the defendant Special School District No. 1, which issue has been severed for trial at a later date. The results of these administrative determinations are reflected in the total number of striking teachers recited in Paragraph 6 of the stipulation of facts, and in the list of teachers filed with the Court, which list, and the determinations thereon, is by reference made a part hereof, without prejudice to the further issues in regard thereto reserved for court determination in further proceedings in this matter.

CONCLUSIONS OF LAW

1. Attorney General Douglas M. Head, in the name of the State of Minnesota, possesses the requisite standing to challenge the settlement provisions pursuant to both common law and statute, the latter authority being Minnesota Statutes 1969, Sec. 8.01.

2. The actions of a majority of the members of defendant Minneapolis Federation of Teachers, Local No. 59, in absenting themselves from work for the purpose of influencing conditions of employment commencing on April 9, 1970, constituted a strike within the meaning and intent of Sec. 179.51.

3. The actions of some of the individual members of defendant City of Minneapolis Education Association in absenting themselves from work for the purpose of influencing conditions of employment commencing on April 9,

1970, constituted a strike within the meaning and intent of Sec. 179.51.

4. The actions by the teachers in commencing a strike on April 9, 1970, were in direct violation of the "No-Strike" Law, namely Minnesota Statutes, Sec. 179.51.

5. That when each teacher violated the provisions of the "No-Strike" Law, Sec. 179.51, his employment with the defendant Special School District No. 1 was automatically terminated without any action by or on behalf of the defendant Special School District No. 1 or the Board. Termination of their employment arose by operation of law due to the intent and meaning of the violation provision, Sec. 179.54.

6. That by the operation of Sec. 179.54, the striking teachers were not employees of the Board during the entire strike period, namely, from April 9, 1970, until April 29, 1970.

7. That Resolution Exhibit B, pursuant to which the striking teachers were paid for the said seven days during the strike period when they were not employees of the Board, is null and void and of no force and effect.

8. The re-employment of the striking teachers pursuant to the terms and conditions of Resolution Exhibit A, is in violation of Sec. 179.55 in that a) the compensation to be paid to each such striking teacher for services performed immediately following the rehiring will exceed that received by him immediately prior to the violation; b) the compensation to be paid to each such striking teacher will be increased prior to the expiration of one year from the appointment or reappointment of such teacher.

9. Minnesota Statutes, Secs. 179.51, 179.54 and 179.-55 are constitutional in all respects.

10. The parties have advised this Court that an accelerated appeal to the Minnesota Supreme Court is contemplated regardless of the decision of this Court; the defendant School Board has called the Court's attention to its claim and the Court finds that by law it is required to make its levy of taxes for the year 1971 in October, 1970, and that once made such levy cannot be increased; the defendant Special School District No. 1 has requested this Court not to make any order relative to such levy in the instant matter at this time, but to abide the event of final determination of this matter on appeal or by action of the legislature; the defendant Special School District No. 1 has consented that upon a prompt appeal this Court may make an order in the conclusions of law and order for judgment herein that funds from the levy to be made by it in October, 1970, are to be sequestered and earmarked to abide the event of final resolvement of the issues in this matter on appeal and that if it is finally determined on appeal, payments by the Special School District No. 1 under said Resolutions A and B are illegal, that then such escrowed funds shall only be used for the purpose of reducing the tax levy to be made in October, 1971.

11. That on related considerations the payments provided for and made pursuant to Resolution B should remain in status quo pending final determination of all the issues in this matter on appeal, when an appropriate order in this matter may be made by this or any appropriate court on the application of persons or parties entitled to do so; that this Court retains jurisdiction for such purpose.

ORDER FOR JUDGMENT

Let judgment be entered as follows in favor of the plaintiffs and against the defendants and each of them:

1. Resolution Exhibit A, attached to plaintiff's complaint, is in violation of Minnesota Statutes 1969, Sec. 179.55, and is null and void and of no force and effect;

2. Resolution Exhibit B, attached to plaintiff's complaint, is null and void and of no force and effect;

3. Defendant Special School District No. 1 is hereby enjoined from making payment to striking teachers pursuant to the provisions of said Resolution Exhibit A.

That funds from the levy to be made by the defendant Special School District No. 1 in October, 1970, to the extent that such funds were contemplated for the payment to striking teachers as provided in Resolution A shall be sequestered and earmarked in the hands of the defendant Special School District No. 1 to abide the event of final resolution of the issues on appeal and shall not be used to make the payments to striking teachers as provided by Resolution A until final resolvement of the issues herein on appeal permitting such payment; that the defendant Special School District No. 1 is accordingly enjoined from using any tax revenue for such purpose until such final resolvement of the issues herein on appeal.

4. Defendants Minneapolis Federation of Teachers, Local No. 59, and City of Minneapolis Education Association and the individual striking teachers are hereby enjoined from receiving and from taking any action to implement or put into effect Resolution Exhibit A until the further order of an appropriate court in regard thereto.

5. That payments made by defendant Special School District No. 1 to striking teachers as provided for in Resolution B shall remain in status quo pending the final determination of the issues herein on appeal and the further order of an appropriate court in regard thereto; that this Court retains jurisdiction in regard thereto.

Dated August 26, 1970.

By the Court:

THOMAS TALLAKSON,
Judge of District Court.

MEMORANDUM OF LAW

The facts generating this lawsuit are totally stated in the stipulation of facts submitted by all the parties hereto, and the Court has accepted the said facts as true and correct, as though specifically found as facts by the Court. The findings of fact entered above include generally mainly those facts which appear to the Court to be mainly relevant to the issues in this lawsuit. The issues in this lawsuit are as follows:

1. Whether the Attorney General in the name of the State of Minnesota possesses the requisite standing to challenge the settlement provisions.

2. Whether Resolution A, which provides for a lump sum payment to the striking teachers at the end of the 1970-71 school year, is valid and enforceable in light of the rehiring provisions, namely, Sec. 179.55.

3. Whether Resolution B, which calls for the payment

of compensation to the striking teachers for a seven-day period during the strike, is valid and enforceable.

4. Whether the "No-Strike" Law, Sec. 179.51 and its attendant provisions, is constitutional. The issues will be dealt with in that order.

1. The law of the State of Minnesota is clear that the Attorney General may commence such actions whenever, in his opinion, the interests of the state require it. He possesses such power pursuant to both common law and statute.

In regard to common law powers, the Attorney General is regarded as the chief law officer of a state and possesses all of the powers inherent in that office at common law. He possesses original discretion which he may exercise in instituting proper proceedings to secure the enforcement of law. State ex rel. Young v. Standard Oil Co., 111 Minn. 85, 126 N.W. 527 (1910). The Attorney General may institute, conduct, and maintain all such actions and proceedings as he deems necessary for the enforcement of the laws of the state, the preservation of order, and the protection of legal right. Slezak v. Ousdigian, 260 Minn. 303, 110 N.W.2d (1961).

The Attorney General also possesses explicit statutory powers to commence litigation. Minnesota Statutes 1969, Sec. 8.01 provides in part:

> The Attorney General shall appear for the state in all causes in the supreme and federal courts wherein the state is directly interested; also in all civil cases of like nature in the district co whenever in his opinion, the interests of the state quire it.

The Attorney General has therefore exercised his discretion in instituting this lawsuit; it is apparent he has the power to do so under both common law and statute.

Certain of the defendants raise the issue whether the Attorney General is deprived of this standing by the fact that during the course of the strike the state refused to mediate this dispute. However, this action could not possibly vitiate the standing of the Attorney General because there is no existing statutory right to state mediation in a labor dispute involving the public school teachers. Minnesota Statutes 1969, Sec. 179.521 does provide certain machinery for mediation of labor disputes in the public employment sector. However, public school teachers are excepted from the provisions of this act by Minnesota Statutes 1969, Sec. 179.572. Thus, there is no statutory right to state mediation in a labor dispute involving public school teachers. The latter statute was upheld on constitutional challenges in Minneapolis Federation of Teachers v. Obermeyer, 275 Minn. 347, 147 N.W.2d 358 (1966).

Without a statutory right to state mediation, the request for mediation could only have been honored by means of a voluntary act by the Governor to provide assistance. The act of declining voluntary assistance could not operate to impede a later court challenge to the settlement agreement as being in violation of state statutes.

2. Resolution Exhibit A provides basically for a lump sum payment to the striking teachers as part of the last pay check for the 1970-71 school year, an amount equal to the difference in pay between what the teacher receives during the year and what he would have been paid if he had been employed at the appropriate step and lane of the 1970-71

salary schedule. In other words, a striking teacher, as part of the last pay check for the next school year, will be paid an amount equal to what he would have been paid had he not been on strike. Thus, as of the final pay check next year, both strikers and nonstrikers will have received the exact same amount of money for performing their duties during the 1970-71 school year.

It seems apparent that this resolution is basically an agreement to provide compensation for the striking teachers during one year following the strike, although the physical payment of this compensation is deferred until after the expiration of one year following the rehiring. This fact can be seen from the resolution itself. Paragraph 3 indicates that the lump sum payment is directly related to the faithful performance of duty during the year and is thus deferred compensation. In other words, the teachers must adequately perform their duties during the year and if they do so they will receive compensation, although the physical payment thereof is delayed until the end of the year. Thus the teachers are accruing compensation on a daily basis. Paragraph 4 indicates that compensation is present for duties performed during the year following the rehiring in certain cases. Teachers who do not complete the year for certain reasons are entitled to a pro-rata share of the payment. The defendant Board of Education by indicating that certain teachers will be paid a pro-rata share following their termination for various reasons has in effect admitted that these teachers are receiving increased compensation in the year following the rehiring. Paragraph 5 is a further indication of the intent of the resolution. This provides that payments made at the end of the year shall be made without interest. This language indicates that the Board and the

teachers looked upon the increased compensation as accruing on a daily basis with payment deferred to the end of the year. If this were not so it would have been unnecessary to specify that the payments will be made without interest. By disclaiming interest, the Board belied the fact that the right to the increased compensation accrued on a daily basis.

In reaching this result, the Court reads the word "compensation as found within Sec. 179.55 as including the right to the payment accruing during the year following the rehiring, and not simply the act of physically paying someone for services. In achieving this result the Court has considered the legislative history of the "No-Strike" provisions. The Legislature in Sec. 179.51 prohibits strikes by public employees, a strike being defined as a willful absence from one's position for the purpose of influencing or coercing a change in the conditions or obligations of employment. The object of the statute was to prohibit the obvious dangers to the public as the result of work stoppages by public employees. In order to make the law effective, the Legislature also passed Secs. 179.54 and 179.55, the former setting forth the penalty of immediate termination of employment when a public employee engages in a strike, the latter setting forth the conditions under which a striking employee may be rehired. The Legislature obviously looked upon these last two statutes as a necessary means to deal with the problem of strikes in the public sector. By Sec. 179.55 the Legislature intended that if a public employee is rehired after violating the statute, he be severely reprimanded. Section 179.55 imposes restrictions by providing limitations when the public employer desires to rehire the public employee. His compensation cannot exceed that received by

him prior to the violation and his compensation cannot be increased until after the expiration of one year from the date of his rehiring. There also are restrictions in regard to his civil service status and tenure of employment. The Court would read these restrictions in the manner in which the Legislature intended: namely, that he cannot actually be paid an increased salary during the year following the rehiring, and neither can he accrue the right to increased compensation during the year following the rehiring with the physical payment thereof deferred until the end of the year. The Court is of the opinion that this is the only meaningful way to read this statute; to read it in the way defendants would desire would completely frustrate the purposes and intent of the statute. This Court will look not merely to the letter of the statute but to the intent of the Legislature. A literal reading of a statute will not be used to defeat its purpose and spirit. See Board of Supervisors of Ramsey County v. Hennan, 2 Minn. 281 (1858); Township of Equality v. Township of Star, 200 Minn. 316, 274 N.W. 219 (1937); Watson v. Flynn, 216 Minn. 354, 13 N.W.2d 11 (1944).

The Court is thus of the opinion that Resolution Exhibit A is contrary to the spirit and intent of Sec. 179.55 and it is thus not within the law. That statute is viable only if it prohibits not only increased compensation actually paid, but also increased compensation, the right to which accrues following the year of rehiring.

3. Resolution B provides that all teachers who return to work on April 29, 1970, will be paid for seven days during the strike period deducting any amounts which may have previously been paid for days not worked. These payments have already been made to the striking teachers.

The Court is of the opinion that Resolution Exhibit B is null and void and of no force and effect. When the individual teachers went on strike on April 9, 1970, they violated the provisions of Sec. 179.51. The penalty provision as found in Sec. 179.54 provides that "any public employee who violates the provisions of Secs. 179.51 to 179.58 shall thereby abandon and terminate his appointment or employment . . ." This statute was construed in Garavalia v. City of Stillwater, 283 Minn. 335, 168 N.W.2d 336 (1966). That case established that when a public employee chooses to strike and does in fact violate Sec. 179.51 his employment is automatically terminated by operation of law. The material fact is that the employee violated the "No-Strike" statute, which violation causes the termination of his employment to arise by operation of law due to his own conduct. From that time on the individual is no longer a public employee. It follows that he simply cannot be paid any compensation for any of the time period during which he is on strike. To do so would only constitute a gratuity which a public body cannot legally pay. The striking individual could only be paid for services rendered to the public employer after he is rehired in accordance with the provisions of Sec. 179.55.

This reasoning of course only applies to those teachers on strike. The defendant School Board attempts to lump together in one category both the striking teachers and the nonstriking teachers and claim that they are entitled to pay both categories. However, it is obvious that the persons not on strike remain employees of the Board during the strike period and could thus be paid for this period of time. However, the striking teachers were not employees of the Board and the Board simply cannot pay them for any period of time prior to their re-employment.

Thus Resolution Exhibit B is contrary to law and is null and void and without legal effect.

4. Certain of the defendants have raised the issue whether the "No-Strike" Law violates equal protection and the due process provisions. It is the opinion of the Court that Secs. 179.51; 179.54 and 179.55 are constitutional.

First, defendants claim that the "No-Strike" statute violates that equal protection clause. Defendants here contend that the Legislature cannot forbid strikes by employees in public employment while not forbidding strikes by employees in private employment. But the equal protection clause does not prevent a state from legislating against a significant social evil such as strikes in the public sector, simply because related evils may be uneffected by the statute. The Minnesota Supreme Court has so indicated in Johnson v. State Civil Service Department, 280 Minn. 61, 157 N.W.2d 747, 752 (1968), wherein the Court stated:

> The equal protection clause does not command that either all evils of the same kind be eradicated by a statute or none at all.

The equal protection clause does require that when a legislature identifies one class of persons for treatment different from that accorded another class, then the distinction between the two must be logical and must be relevant to the achievement of a valid state objective. The constitutional standard is violated only if the classification rests on grounds wholly irrelevant to the achievement of the state's objective.

The "No-Strike" statute does cause public employees to be treated differently than private employees. The Minne-

sota Legislature therefore has created a distinction between the two based upon the nature of their employment. The purpose of the distinction is to protect the citizens of the state from the harms associated with strikes in the public sector. Both the United States Supreme Court and the Minnesota Supreme Court have adhered to the principle that the creation of such distinctions is largely a matter of sound legislative discretion which must be respected by the courts in the absence of a clear showing of abuse. In Minneapolis Federation of Teachers v. Obermeyer, 275 Minn. 347, 147 N.W.2d 358 (1966), the Court stated:

> When the legislature had determined that a sufficient distinction exists between two classes of persons to justify applying rules to one class which did not apply to the other, such determination is binding upon the courts unless it appears that the distinction is purely fanciful and arbitrary and that no substantial or logical basis exists therefor. Classification can never be a judicial question except for the purpose of determining, in a given situation, whether the legislative action is clearly unreasonable. In the matter of classification, courts have viewed the action of the legislature with great liberality. Courts are not to weigh the merits of a classification in the judicial balance and to reject it merely because they might favor a different standard.

275 Minn. at 354.

Distinctions between public and private employees which courts have relied upon as justification for the "No-Strike" rule are 1) the profit motive is nonexistent in the public sector; 2) representative government is designed to be responsive to political rather than economic pressure; 3) pub-

lic funds shall not be encumbered against the will of the legislature; 4) public employees owe a special duty to their employer. These distinctions between public and private employees are neither fanciful and arbitrary nor without substantial or logical basis. Rather they are real, substantial and rational. Such distinctions are thoroughly sufficient to satisfy the standard imposed upon legislative discretion in this area by the United States Supreme Court in McGowan v. Maryland, 366 U.S. 420 (1961) and by the Minnesota Supreme Court in Obermeyer, supra, and Johnson, supra.

Moreover, in other contexts, many courts have recognized the legality of a statutory distinction between public and private employees. Johnson v. State Civil Service Commission, supra; United Public Workers v. Mitchell, 330 U. S. 75 (1947); United States v. United Mine Workers, 330 U.S. 258 (1947); Rankin v. Shanker, 23 N.Y.2d 111, 242 N.E.2d 802 (1968); City of New York v. Delury, 295 N. Y.S.2d 901, 243 N.E.2d 28 (1968).

Defendant Minneapolis Federation of Teachers, Local No. 59, has also attacked the legislative classification of public school teachers as contrasted with other public employees. The defendant's claim is that such a distinction constitutes a violation of equal protection. This precise issue was faced by the Minnesota Supreme Court in Obermeyer, supra, wherein the Court held that rational distinctions are present between public school teachers and other public employees.

Thus, it is the opinion of this Court that the Minnesota "No-Strike" statute does not violate the equal protection clause.

Defendants contend further that the "No-Strike" statute violates due process of law. This basically involves two questions; namely, whether the "No-Strike" statute deprives public employees of property, and secondly whether the statute satisfies the requirements which due process imposes upon government "takings" if there is a property right involved.

Although the Minnesota Supreme Court has stated in dicta that labor possesses a common law right to strike and that this right may be deemed property which is entitled to the protection of due process, Fairview Hospital Association v. Public Building Service Union, 241 Minn. 523, 64 N.W.2d 16 (1954), this right has never been extended to government employees. Public employees have never possessed property in the form of a common-law right to strike and thus can hardly claim to be deprived of such property by a statute which merely adopts the common-law rule. Even if public employees at some time did possess a right to strike, nevertheless, this right was limited and susceptible to the police power regulation as contained in the "No-Strike" statute. See Auto Workers v. Wisconsin Employment Relations Board, 336 U.S. 245 (1949).

Even if public employees are considered as possessing a right to strike which is classified as property, it is clear that this statute satisfies the requirements which due process imposes. The statute complies fully with the due process requirements found in the Auto Workers case, supra, because it is reasonably calculated to achieve a valid state policy.

Further, the public employees are provided with substitute procedures for asserting collective bargaining demands. These procedures are found in the "meet and confer law," Minnesota Statutes 1969, Secs. 125.19 to 125.26. Thus,

the court is of the opinion that the statute under consideration does not violate due process.

In this matter the parties have submitted briefs containing citations from courts, articles and commentaries, all dealing essentially relative to the question of public employees and strikes. The Court has considered all of these presentations as carefully as possible.

After doing so, it appears that the Court must view and decide the issues in this matter upon the legal principles involved and the philosophy which justifies such principles.

It is conceded by the parties that in the main the issues presented in this matter are matters of first impression in Minnesota. Looking at the philosophical background of the legal principles here involved, this Court has implicitly determined that the State has an obligation and right, through the Legislative Department of its government, to determine what are matters of public interest involving public employees in the discharge of their duties. The Legislature in 1951 acted in the area of public employees in fulfillment of this duty in regards to the issues here involved. There seems to be no dispute as to the State's right to do so. The question before this Court is whether said right has been exercised fairly and whether the provisions enacted by the Legislative Department are legally correct and binding on the defendant teachers and others dealing with them.

It is to be noted that the legislation involved has, in the main, existed to the present situation without an incident of a major strike and without challenge in the form of a major strike.

Legislative enactments have a presumption of validity.

This presumption has not been overcome by the evidence in this case.

While the striking teachers concede the State's right, within certain limitations, to regulate the employment arrangements of public employees, they claim that they must have some effective remedy as a substitute for the right that non-public employees have to strike. The teachers claim that this they do not have in the factual situation in the instant case. Specifically, they claim that the "meet and confer" law, M.S.A. 125.19 to 125.26, is not an effective and realistic remedy.

The Court has decided this case on the legal principles involved. In doing so, the Court could not also avoid being aware of the extreme method chosen by the striking teachers to accomplish their apparently sincere claims. They have chosen to strike in defiance of a long-standing prohibition against a strike by public employees. They are asking this Court in this context to judicially determine that the legislative provision in the meet-and confer legislation is not sufficient to sustain the state's no-strike law, with an intimation that thereby the no-strike law is arbitrary and capricious. This Court does not feel it can, in fulfillment of its judicial duties, so hold. Direct defiance of a presumably valid law, with much danger in many directions as a result thereof, is ordinarily not the proper or authorized method to accomplish an otherwise meritorious result, while there are other legal procedures available.

The extreme method and means used by the teachers to test the validity of the no-strike law by self-help and self-interpretation no doubt created a grave emergency for the School Board in the light of its legal duty to give the school

children educational opportunities also prescribed by law. Again, even with the understandable motive of the School Board to fulfill its said duty, it is difficult for the Court to reach a practical result that appears violative of legally enacted law. It is to be noted that when considering the judicial question of whether the meet and confer law is, in legal contemplation, so inadequate a vehicle as a matter of law as a substitute for the privilege of striking that the Legislature did also therein provide a panel procedure through which the parties could further explore and hopefully resolve their employment differences. It is to be noted that the defendant Minneapolis Federation of Teachers, Local No. 59, failed and refused to participate in such procedure. It is further significant that the defendant School District ultimately offered the teachers $600,000 in excess of the findings of this panel. While having all of this in mind, the Court has made its decision in this matter solely on the legal principles involved. In doing so, the Court has also attempted to formulate these findings of fact, conclusions of law and order for judgment and decree herein in such a manner as to best give all parties concerned the opportunity to have final resolvement of this matter of first impression on appeal, keeping the status quo relative to the machinery of carrying out the disputed settlement in the meantime.

Let this memorandum be attached to and be a part of the foregoing findings of fact, conclusions of law and order for judgment and decree.

By the Court:

THOMAS TALLAKSON,
Judge of District Court.

3. OPINION OF MINNESOTA SUPREME COURT

No. 265 1/2

Hennepin County

Nelson, J.

Took no part, Murphy,

DOUGLAS M. HEAD, Attorney General, State of Minnesota,

Respondent,

KEITH W. DAVIDSON, ET AL.,

Respondents,

42734, 42747, 42766 & 42852

vs.

SPECIAL SCHOOL DISTRICT NO. 1, ETC., ET AL.,

Appellants,

MINNEAPOLIS FEDERATION OF TEACHERS, LOCAL NO. 59,

Respondent-Appellant,

CITY OF MINNEAPOLIS EDUCATION ASSOCIATION,

Respondent-Appellant.

Endorsed
Filed December 9, 1970
John McCarthy, Clerk
Minnesota Supreme Court

SYLLABUS

1. The attorney general may commence litigation whenever, in his opinion, the interests of the state require it. He possesses such power pursuant to both common law and statute, and possesses original discretion which he may exercise in instituting proper proceedings to secure the enforcement of law.

2. A law must be sustained unless unconstitutional beyond a reasonable doubt, and the power of the courts to hold the law unconstitutional is exercised only when absolutely necessary. If the language of the law can be given two constructions, one constitutional and the other unconstitutional, the constitutional one must be adopted, though the unconstitutional construction may be more natural.

3. Public employees do not have a common-law right to strike and can acquire the right only through legislation.

4. Activities protected by the First Amendment to the United States Constitution do not include strikes.

5. The legislature, acting under its police power, may prohibit strikes in certain fields of endeavor when the interests of public health, safety, and welfare are involved.

6. Public employment cannot be considered a property right within the meaning of the due process and equal protection clauses of the United States Constitution.

7. The provisions of Minn. St. 179.51, 179.54, and 179.55 are constitutional and applicable in all respects to this case. Thus, an agreement by a board of education to pay teachers an amount equal to their regular compensation for 7 days when they were on strike is null and void

under § 179.54. An agreement to pay striking teachers increased compensation for duties performed within one year from the date of their violation of § 179.51 is prohibited by § 179.55.

Affirmed.

OPINION

NELSON, Justice.

Appeal from an order and judgment of the District Court of Hennepin County permanently enjoining defendant Special School District No. 1 from making payment to striking Minneapolis school teachers pursuant to an agreement for increased wages and benefits negotiated between defendant board of education and defendants Minneapolis Federation of Teachers, Local No. 59, and City of Minneapolis Education Association.

The case arises out of the Minneapolis school teachers' strike of April 1970. The facts have been stipulated to by all parties. Defendant Special School District No. 1 (hereinafter referred to as the school district) is the school district for the city of Minneapolis and, as such, has all the rights, privileges, duties, and obligations of an independent school district as provided for by the laws of the State of Minnesota. Defendant board of education (hereinafter referred to as the board) governs and has the care, management, supervision, conduct, and control of defendant school district. The school district in the school years 1969-1970 employed 3,400 teachers. Most of these teachers belong to one of two associations which represent their interests in negotiations with the board. These associations are defendant Minneapolis Federation of Teachers, Local No. 59

(hereinafter referred to as MFT), a voluntary union of teachers and others employed by the board; and defendant City of Minneapolis Education Association (hereinafter referred to as CMEA), a voluntary association of teachers and others employed by the board.

Defendant school district and its board, in dealing with its teachers, are governed by the so-called "meet and confer law," Minn. St. 125.19 to 125.26. Pursuant to this law, a teachers' council was established in the fall of 1969 consisting of three members of defendant MFT and two members of defendant CMEA to represent the teachers' interests in reaching agreement on "conditions of professional services" between the teachers and the board for the school years 1970-1971. As defined in § 125.20, subd. 5, conditions of professional services means "economic aspects relating to terms of employment, but does not mean educational policies of the district." Beginning in December 1969, defendant board, through a committee, met with the teachers' council in an effort to reach agreement for the school years 1970-1971 on conditions of professional services. The committee and the teachers' council also exchanged information and expressed views on a wide variety of subjects of interest to the board and its teachers.

Despite extensive negotiations and discussions by the board's committee and the teachers' council, the two were, in February 1970, still over $10 million apart in regard to the teachers' salary schedule for the 1970-1971 school year. Therefore, in accordance with § 125.25, the board, by official action on February 24, 1970, requested the establishment of an adjustment panel, named its representatives to the panel, and notified the teachers' council of its action. The teachers' council chose not to appoint any repre-

sentative to the adjustment panel or take part in any of its proceedings. Subsequently, the other two members to the adjustment panel were named by the chief judge of the Hennepin County District Court, one of those members being the president of MFT. He did not attend the proceedings or participate in any way in the deliberations or final recommendations of the adjustment panel.

On April 7, 1970, the adjustment panel adopted findings of fact and recommendations, which the board accepted and resolved to put into effect.

On April 6 the members of defendant MFT, by majority vote, determined to absent themselves from work in order to influence conditions of employment. The agreed date on which this was to commence was April 9, 1970.

On April 8 defendant CMEA applied to the board for personal leave on behalf of all its members for April 9 and 10. The board rescinded and canceled the personal leave policy and notified defendant CMEA of that action.

On April 9 certain members of defendant MFT went on strike against defendant school district and its board. Defendant CMEA determined by majority vote not to join in the strike. Despite this, some of its members did absent themselves from work commencing April 9 and joined the strike. Other CMEA members absented themselves and purported to take personal leave for April 9 and 10. On Thursday, April 9, and Friday, April 10, about 1,200 teachers were at work. Approximately 2,200 were absent from work on those days, and active bannering and picketing took place at all schools.

On April 8 and 9, defendant board obtained temporary

restraining orders against defendants MFT and CMEA and their officers, restraining and enjoining them from participating in a strike as defined in Minn. St. 179.51, and also from picketing school property or interfering with the normal operations of the schools. These orders also required the two organizations and their officers to show cause why a temporary injunction in similar language should not be issued. Defendant school district administratively determined that all teachers who absented themselves from work on Friday, April 10, 1970, were "on strike," that the provisions of § 179.54 were applicable, and that these teachers thus had terminated their employment. See, Garavalia v. City of Stillwater, 283 Minn. 335, 168 N.W.2d 336. Teachers who were present on April 10 were not treated as being on strike, regardless of whether they were or were not in attendance at their jobs on April 9.

Despite the temporary restraining orders, certain teachers continued on strike and continued to picket and banner throughout the week of April 13 to 17. Under these circumstances, the school administration decided to close the schools due to the possible danger to life and property of the students, teachers, and general public. Thereafter, the schools remained closed by various administrative actions, ratified by defendant board from time to time, from April 13 until April 29. On April 20 a writ of temporary injunction was issued and served on defendants MFT and CMEA and their officers. Thereafter, until the schools opened on April 29, there was no general picketing of the schools.

From April 13 to April 20, the board's committee met and conferred with the three MFT members of the teachers' council, defendant MFT allegedly excluding defendant

CMEA's representatives from the meetings. On April 15 defendant CMEA sued to enjoin the board and MFT from continuing the meetings without the presence of the two CMEA members of the teachers' council. On April 21 the district court issued an order restraining defendants from calling or conducting meetings between the teachers' council and the board of education without first providing notice to all five members and affording each member a full opportunity to attend. By April 20 the board's committee and the MFT members of the teachers' council had worked out exact language to be included in all policy items for adoption by the board. However, on that same day, the board broke off negotiations with the teachers' council because the latter rejected the board's final offer of a salary and fringe schedule. After this announcement of its final offer, the board further announced that it would attempt to reopen the schools shortly. From April 20 on, the board conducted no further negotiations with the teachers' council but did remain in informal contact with the leaders of the two organizations.

After negotiations had broken off, the board on April 21, 1970, mailed to all teachers the final salary offer made to the teachers' council and certain policy language which had been worked out for adoption by the board. On April 22 it mailed to every teacher a request that he advise the board of his intent to return to teaching duties upon the reopening of the schools. Only 1,500 teachers indicated their intent to return to work, and many of these qualified their intent by stating they would return only if they deemed it safe to do so. Because this response was less than one-half of the full complement of teachers, the board was concerned at the prospect of attempting to reopen the schools.

From discussions with defendant MFT over the weekend of April 25 and 26, the board concluded that the MFT leadership would not recommend that its striking teachers return to work without assurance of reimbursement for money lost through nonpayments since April 9 and further assurance that after a year had elapsed they would receive a payment or payments equal to the money lost during the 1970-1971 school year through application of the statutory restriction of Minn. St. 179.55 against their receiving increased pay for services performed within a year following a strike. The board concluded also that no substantial number of MFT teachers would return without the recommendation of their leadership and that many CMEA teachers would fail to return unless assured that the schools would have nearly complete staffing so as to be safe for all concerned.

At this point, the board felt it could not reopen the schools with very limited staff. Also, on April 24 the board was advised by the commissioner of education that its eligibility for state aids was in danger if the schools did not open in the very near future.

Faced with this situation, the board on April 27, 1970, reached agreement with defendant MFT that it would pass three resolutions, two of which are challenged here, in return for favorable action by the leaders of defendants MFT and CMEA recommending that their respective members return to teaching on April 29, 1970. On April 28 the board passed the resolutions and the schools were reopened April 29.

The resolutions are applicable without regard to teacher organization membership. Pursuant to Resolution A, the

board rehired the striking teachers under the provisions of § 179.55 and intends to pay to each of them as part of his or her last paycheck for the school years 1970-1971 an amount equivalent to the difference in pay between what that teacher was paid during the 1970-1971 school year and what he would have been paid during the school year if he had been employed at the appropriate step and lane of the 1970-1971 salary schedule.

Pursuant to resolution B, the board paid each of the striking teachers for 7 days during the strike period (April 20 to 24, 27 and 28) an amount equal to their regular compensation.

Plaintiff, the attorney general of the State of Minnesota, then brought this action to determine the legality of Resolutions A and B. In his complaint, he requested declaratory relief and injunctive relief against defendants. Later, on motion, plaintiffs Keith W. Davidson, Katherine V. Howard, Harvey A. Ring, and Betty K. Robb were granted permission to intervene on their own behalf and on behalf of all other taxpayers and residents of Minneapolis. At trial, an agreed stipulation of facts was received into evidence. Based thereon, and the parties' written and oral arguments, the trial court determined that both resolutions were contrary to law. The trial court ordered that a permanent injunction issue prohibiting the school board from paying the compensation provided by the resolutions. The various defendants have appealed from the order and the judgment and injunction entered pursuant to it.

1. The attorney general's standing to commence this action has been questioned. It is clear that the attorney general may commence an action whenever, in his opinion,

the interests of the state require it. He possesses such power pursuant to both common law and statute.

As the chief law officer of the state, the attorney general possesses all of the powers inherent in that office at common law. He possesses original discretion which he may exercise in instituting proper proceedings to secure the enforcement of law. The attorney general may institute, conduct, and maintain all such actions and proceedings as he deems necessary for the enforcement of the laws of this state, the preservation of order, and the protection of legal right. Slezak v. Ousdigian, 260 Minn. 303, 110 N.W.2d 1.

The attorney general also possesses explicit statutory powers to commence litigation. Minn. St. 8.01 provides in part:

> "The attorney general shall appear for the state in all causes in the supreme and federal courts wherein the state is directly interested; also in all civil causes of like nature in the district courts whenever, in his opinion, the interests of the state require it."

The attorney general has therefore exercised his discretion in instituting this lawsuit. It is apparent that he has the power to do so under both common law and statute.

2. The Minnesota public employees "no-strike" law, Minn. St. 179.51 was first passed by the 1951 Minnesota Legislature in response to a Minneapolis public employees' strike. The rationale for the "no-strike" law is very clearly set forth in the preamble to L. 1951, c. 146, which states that "strikes by public employees are a real danger to the safety and welfare of the general public * * * and

constitute a strike against the public itself." The specific provisions of the Public Employees Labor Relations Act in dispute are Minn. St. 179.51, which prohibits strikes by public employees; § 179.54; and § 179.55.

Section 179.54 provides as follows:

> "Notwithstanding any other provision of law, any public employee who violates the provisions of sections 179.51 to 179.58 shall thereby abandon and terminate his appointment or employment and shall no longer hold such position, or be entitled to any of the rights or emoluments thereof, except if appointed or reappointed as hereinafter provided."

Section 179.55 provides:

> "Notwithstanding any other provision of law, a person knowingly violating the provisions of sections 179.51 to 179.58 may, subsequent to such violation, be appointed, or reappointed, employed or re-employed, as a public employee but only upon the following conditions: (a) his compensation shall in no event exceed that received by him immediately prior to such violation, (b) the compensation of such person shall not be increased until after the expiration of one year from such appointment or reappointment, employment or re-employment, and (c) the said person shall be on probation for two years with respect to such civil service status, tenure of employment, or contract of employment, as he may have theretofore been entitled."

These statutes have their derivation from New York's

Condon-Wadlin Act, § 108 of the New York Civil Service Law, which was repealed in 1967.[1] In fact, practically the same wording is found in the New York law and Minn. St. 179.51, 179.54, and 179.55. The Condon-Wadlin Act provided for the automatic dismissal of striking employees (N. Y. Civil Service Law, § 108, subd. 4) as does § 179.54. The New York act (§ 108, subd. 5) also made provision for rehiring striking employees similar to the requirements of § 179.55, except that under the New York statute any striker subsequently rehired could not receive higher pay for 3 years following the strike (as compared with 1 year under § 179.55) and would remain on probation for 5 years (as compared with 2 years under § 179.55).

The trial court in the case at bar found that certain teachers of the school district were on strike in violation of § 179.51; that this violation constituted automatic abandonment and termination of their employment pursuant to § 179.54 (see, Garavalia v. City of Stillwater, 283 Minn. 335, 168 N.W. [2d] 336); and that the provisions of § 179.55 must be followed in the re-employment of such teachers. It concluded that Resolution A and Resolution B violate §§ 179.55 and 179.54 respectively. It also determined that §§ 179.51, 179.54, and 179.55 are constitutional.

In our consideration of whether these statutes are constitutional or not, we start with the principle that a law must be sustained unless unconstitutional beyond a reasonable doubt. Laws are held constitutional if reasonably possible. The power of the courts to hold the law unconstitutional is exercised only when absolutely necessary, and

[1]Laws of New York 1967, c. 392.

then, with extreme caution. If the language of the law can be given two constructions, one constitutional and the other unconstitutional, the constitutional one must be adopted, though the unconstitutional construction may be more natural. A law may not be declared unconstitutional merely because the court believes it is bad policy or bad economics. 17 Dunnell, Dig. (3 ed.) § 8931.

There is a presumption in favor of constitutionality. It is presumed that the legislature intended to keep within constitutional limits and enact a constitutional law. See, 17 Dunnell, Dig. (3 ed.) § 8929, and cases therein cited.

3. Although we have found no case directly in point with the case at bar, generally, when the courts have faced the issue of the constitutionality of statutes similar to §§ 179.51 to 179.58, they have held these statutes to be constitutional.

The Condon-Wadlin Act was before the New York courts many times from 1960 to its subsequent replacement by the Taylor Law in 1967. The validity of the act, constitutional and otherwise, withstood frequent attack. Pruzan v. Board of Education of New York City, 25 Misc. 2d 945, 209 N.Y.S.2d 966, appeal on constitutional ground dismissed, 9 N.Y.2d 680, 212 N.Y.S.2d 416, 173 N.E.2d 237; City of New York v. Social Service Employees Union, 48 Misc.2d 820, 266 N.Y.S.2d 277, affirmed, 25 App. Div.2d 953, 271 N.Y.S.2d 585. See, also, Matter of Di Maggio v. Brown, 19 N.Y.2d 283, 279 N.Y.S.2d 161, 225 N.E.2d 871, involving ferryboat officers employed under the New York Civil Service Law. In Board of Education of City of New York v. Shanker, 54 Misc.2d 941, 283 N.Y.S.2d 548, affirmed, 29 App. Div.2d 634, 286 N.Y.S.

2d 453, an action for criminal contempt brought by plaintiff school board against a teachers' union and its president, the Court reiterated the constitutionality of the Condon-Wadlin Act, saying (54 Misc. [2d] 944, 283 N.Y.S.2d 553):

"* * * The constitutionality of this statute has consistently been upheld by our courts * * * *."[2]

City of Detroit v. Division 26 of Amalgamated Assn., 332 Mich. 237, 51 N.W.2d 228, appeal dismissed, 344 U. S. 805, 73 S.Ct. 37, 97 L.Ed. 627, involved a statute similar to Condon-Wadlin, the Hutchinson Act (Public Acts Michigan, 1947, No. 336). Its constitutionality was upheld in a comprehensive opinion by the Supreme Court of Michigan.

3-4. Public employees have no common-law right to strike. It is clearly established common law that a strike by public employees for any purpose is illegal. Kirker v. Moore (S.D. W. Va.), 308 F.Supp. 615; City of San Diego v. American Federation of State, County & Municipal Employees, Local 127, 8 Cal. App.3d 308, 87 Cal. Rptr. 258. In Anderson Federation of Teachers, Local 519 v. School, City of Anderson, — Ind. —, 254 N.E.2d 329, the Indiana

[2]In several instances after the courts had upheld the Condon-Wadlin Act and found that the public employees were on strike and therefore subject to the automatic termination of employment section of the statute and, if rehired, subject to the statutory restrictions of no increase in compensation and probationary treatment, the legislature stepped in to nullify the law. In the New York transit strike, legislation was passed which removed the above penalties from application to transit workers. In a social worker's strike, legislation was passed which made mandatory a hearing to determine whether the strikers were on strike, and in that way, the automatic termination of employment clause was circumvented.

court held that public employees do not have the right to strike and can only acquire it through legislation.

A search of the authorities discloses that many jurisdictions throughout the United States have held that public employees have no inherent right to strike, particularly when legislative enactments prohibit strikes against a public entity as being unlawful. In Minneapolis Federation of Teachers v. Obermeyer, 275 Minn. 347, 147 N.W.2d 358, this Court indicated that the activities protected by the First Amendment of the Constitution do not include strikes, stating (275 Minn. 358, 147 N.W.2d 366):

> "* * * Even in the absence of a statute, we know of no authority which gives a public employee the right to strike. In Norwalk Teachers' Assn. v. Board of Education, 138 Conn. 269, 274, 83 A.2d 482, 484, 31 A.L.R.2d 1133, 1138, President Franklin D. Roosevelt, who was certainly no enemy of labor unions, is quoted as saying:
>
> " '* * * [A] strike of public employees manifests nothing less than an intent on their part to prevent or obstruct the operations of Government until their demands are satisfied. Such action, looking toward the paralysis of Government by those who have sworn to support it, is unthinkable and intolerable.'
>
> "Nor did repeal of the statute affirming the right to join labor unions or other associations operate to their prejudice. The law in its present posture does not prohibit membership in a labor union. The right of freedom to assemble granted under the First Amendment permits teachers to join unions or associations organized to promote their mutual interest. Obviously, mem-

bership in a union which is committed to the use of a strike as a weapon in negotiations with the school board violates the spirit of the law and according to some authorities would justify prohibitory sanctions. Annotation, 31 A.L.R.2d 1142, 1159 to 1164."

5. In Fairview Hospital Assn. v. Public Bldg. Service Union, 241 Minn. 523, 64 N.W.2d 16, this Court considered the issue of whether workers in a charitable hospital have a constitutional right to strike. Although we did not state that public employees have a common-law right to strike, we recognized that labor in the private sector may possess such a right. Clearly, the hospital employees were not public employees but were employees of a nonprofit hospital and, as such, considered private employees. This Court said that the legislature may prohibit strikes in any case when the interest of public health, safety, and welfare is involved (241 Minn. 534, 64 N.W.2d 24):

"Defendants concede, and the laws appear settled, that there are situations when, in the interest of public health, safety, and welfare, the legislature, acting under its police power, may prohibit strikes in certain fields of endeavor. The validity of legislative action along this line is illustrated by such cases as N. J. Bell Tel. Co. v. Communications Workers, 5 N.J. 354, 75 A.2d 721; State v. Traffic Tel. Workers Fed., 142 N.J. Eq. 785, 61 A.2d 570; Wisconsin Employ. Rel. Board v. Amalgamated Assn., 257 Wis. 43, 42 N.W. 2d 471 (reversed on other grounds, 340 U.S. 383, 71 S.Ct. 359, 95 L.Ed. 364), involving public utilities. See, also, State v. Traffic Tel. Workers' Fed., 2 N.J. 335, 66 A.2d 616, 9 A.L.R.2d 854; Local 170 v. Circuit Judge, 322 Mich. 332, 34 N.W.2d 71."

The preamble to L. 1951, c. 146, clearly establishes that the legislature considered a strike by public employees, including public school teachers, as a real danger to the safety and welfare of the general public. Therefore, the provisions of §§ 179.51, 179.54, and 179.55 are within the rule quoted above.

This Court in Johnson v. State Civil Service Dept., 280 Minn. 61, 157 N.W.2d 747, considered the constitutionality of a statute prohibiting a state employee in the classified civil service from filing as a candidate for a compensated public office in view of the First Amendment and the equal protection clause of the Fourteenth Amendment. In holding the statute valid, we said (280 Minn. 65, 157 N.W.2d 751):

> "It is fundamental that there exists no constitutional right to government employment (Adler v. Board of Education, 342 U.S. 485, 72 S.Ct. 380, 96 L.Ed. 517, 27 A.L.R.2d 472), and a state may, as a condition of employment, require compliance with any reasonable and nondiscriminatory restriction upon the activities of its employees in the exercise of rights to which state employees as citizens might otherwise be constitutionally entitled."

We also held in Johnson that the equal protection clause does not prevent the legislature from enacting a statute to prevent a social evil, adding (280 Minn. 68, 157 N.W. 2d 752):

> "* * * The equal protection clause does not command that either all evils of the same kind be eradicated by a statute or none at all. Central Lbr. Co. v.

South Dakota, 226 U.S. 157, 33 S.Ct. 66, 57 L.Ed. 164."

6. A statutory provision against strikes by public employees was held not in violation of the equal protection clause in City of New York v. De Lury, 23 N.Y.2d 175, 295 N.Y.S.2d 901, 243 N.E.2d 128, appeal dismissed, 394 U.S. 455, 89 S.Ct. 1223, 22 L.Ed.2d 414. Similar holdings may be found in Zeluck v. Board of Education, City School Dist. of City of New Rochelle, 62 Misc.2d 274, 307 N.Y.S. 2d 329; Rankin v. Shanker, 23 N.Y.2d 111, 295 N.Y.S.2d 625, 242 N.E.2d 802.

It has been held that one's employment by the state is not property and is not protected by the due process clause. This principle has been uniformly recognized by the courts. It has been held on numerous occasions that a public employee has no vested right to his position. For instance, in City of Detroit v. Division 26 of Amalgamated Assn., 332 Mich. 237, 51 N.W.2d 228, the Michigan court held that public employment cannot be considered a property right within the meaning of the due process and equal protection clauses of the Constitution.

Civil service status is not a vested right. Employees in the classified service of a city do not have a vested right to their employment. It is firmly established in this state that a state employee, even though under civil service, has no vested right to his position. See, Starkweather v. Blair, 245 Minn. 371, 71 N.W.2d 869; Slezak v. Ousdigian, 260 Minn.303, 110 N.W.2d 1.

7. As already stated, the equal protection clause does not grant a right to strike. The provisions of §§ 179.54 and

179.55, discussed in the course of this opinion, are constitutional and applicable herein. Simply stated, as we held in Garavalia v. City of Stillwater, supra, once a person violates the provisions of § 179.51, his employment is automatically terminated by § 179.54, which states that an employee who has abandoned and thus automatically terminated his employment shall no longer hold that position, or "be entitled to any of the rights of emoluments thereof, except if appointed or reappointed as hereinafter provided." No action by the public employer is required. Thus, no paynients or compensation can be made to the striking teachers for the period of nonemployment when they were not employees of the school district. Therefore, Resolution B, which was the agreement by the board to pay the teachers an amount equal to their regular compensation for 7 days when they were on strike, which amount has already been paid, is null and void under the provisions of § 179.-54. In effect, the teachers were paid while they were on strike and their employment had automatically terminated. In addition, Resolution B is untenable because it provided pay for work not performed.

Furthermore, it is obvious, as set forth in the trial court's memorandum and respondents' brief, that it is the intent of the legislature pursuant to § 179.55 that no increase in compensation of any kind can be made to an employee who has violated the provision of § 179.51 and been rehired under 179.55, for a period of one year immediately subsequent to the rehiring. Increased compensation cannot in any way be related to the performance of duties within the period of one year from the date of the rehiring, as is contemplated by Resolution A. Therefore, increased compensation by a lump-sum payment for services rendered dur-

ing a period of one year after the date of rehiring is contrary to the provisions of § 179.55 and cannot be sustained. If the compensation involved in Resolution A is related to work performed during the 1970-1971 school year, and there is agreement that it is, then it is prohibited by § 179.-55.

Since §§ 179.51, 179.54, and 179.55 are constitutional and applicable in all respects to the instant case, the order and judgment of the trial court must be affirmed.

Affirmed.

MR. JUSTICE MURPHY took no part in the consideration or decision of this case.

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4. MEMO ORDER DENYING REHEARING

(Title of Cause.)

February 9, 1971

SIR:

You will please take notice that on this date the following order was entered in the above-entitled cause:

ORDERED, that the petition for reargument herein be and the same hereby is denied and stay vacated.

Yours respectfully,

MAE SHERMAN,
Clerk Supreme Court.

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Supreme Court, U.S.
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JUN 28 1971
E. ROBERT SEAVER, CLERK

In the
Supreme Court of the United States

October Term, 1970
No. ~~486~~ 70-152

Minneapolis Federation of Teachers, Local No. 59

Petitioner

vs.

Douglas M. Head, Attorney General, State of Minnesota; Keith W. Davidson, Katherine V. Howard, Harvey A. Ring and Betty K. Robb, on behalf of themselves and all other Taxpayers and Residents of Special School District No. 1 of the City of Minneapolis; Special School District No. 1 and its Board of Education; City of Minneapolis Education Association; and John Doe

Respondents

SUPPLEMENT TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MINNESOTA

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INTRODUCTION

Petitioner files this supplemental brief pursuant to Supreme Court Rule 24 (5). An interesting facet of our Petition is presently developing in the courts of Pennsylvania and in the courts of Illinois. Petitioner's attention was first directed to these matters by an article in Business Week Magazine, May 22, 1971.

In Pennsylvania an action was brought by the American Federation of State, County and Municipal Employees after "political lay-offs" of 3,500 low-level Republican highway maintenance workers in order to fill those vacancies with registered Democrats. A lower Pennsylvania court issued a preliminary injunction forbidding further political firings and ordered that any newly hired worker be a previously laid-off Republican, and that no additional employees be fired except for cause, with the reasons issued in writing and the discharged employee given a hearing. The union argues that the patronage system with regard to non-policymaking employees, violates the first amendment. Contrast the generally recognized authority of an administration to pick the people it wants in policymaking jobs. The state, on the other hand, argues that the union is attempting to create a civil service where there is none now.

A similar suit is also pending in a Federal Court in Springfield, Illinois.

It seems clear that the unconstitutional conditions doctrine prevents political discharge of the Pennsylvania highway maintenance

workers. 81 Harvard L. R. 1439. This doctrine provides public employees with protection from unconstitutional discrimination. But the distinctive element in the Pennsylvania situation as with the situation of Petitioners is the uncontrolled "mass dismissal". By its very nature, the mass dismissal situation encourages determinations based on individual prejudices. Justification for actions can be found in allegations of otherwise permissible reasons and they will be almost impossible to disprove. Whenever the dismissing body has authority to pick and choose those who will suffer dismissal, and when a large number of employees are dismissed, then there should be careful investigation of the circumstances to determine whether unconstitutional management discrimination accounted for any of the dismissals. This is particularly necessary where the dismissing body acts without a hearing and statement of findings.

In Minneapolis, there was possible discrimination between teacher groups when the School Board determined that certain members, of a teacher organization with which the School Board was currently compatible, were not striking. On the other hand, members of the more liberal teacher group were treated as strikers for engaging in substantially similar activity. This was done by selecting April 10, 1970 as the date to determine strike status as opposed to April 9, 1970, when the teachers were first absent from work. The discrimination could just as easily have taken other forms. For example, the Board could have terminated only those

teachers in inner-city schools where conflicts with teachers were running high, or it could have terminated only teachers who were nearing the top of their pay scale, or it could have terminated for any number of discriminatory, impermissible reasons.

An alleged striker can, of course, request a hearing to establish that he was not on strike, but it would be irrelevant that others who had engaged in substantially similar activity had not been terminated. Therefore, where the teacher's burden of proof must be met by subjective evidence (i.e.-testimony as to his intent in absenting himself from school), and where he feels the real reason for labelling him a striker was discriminatory (also subjective testimony), he is faced with a substantial burden of proof which in all likelihood will sound like 'sour grapes' and will be rejected. We believe that public employees have the right to a hearing and findings which protect them from an arbitrary, discriminatory determination of strike status. This is not provided by Minnesota law, in fact the opposite is encouraged and fostered. Yet the courts are constantly moving closer to requiring the employer to show cause <u>before</u> dismissing large numbers of such employees. There should almost be a presumption of unconstitutional action where mass dismissals are concerned.

> Any statute providing for, or reasonably contemplating, dismissal of large numbers of public employees (mass dismissals), for violation of some statute or conditions of employment, must

provide for pre-termination hearings or be adjudged unconstitutional on its face, because such statutes provoke 'anonymous' discrimination by those representing management, and such statutes are not reasonably oriented to determine whether individuals within the dismissed group did in fact violate the statutes or some condition of employment, or should otherwise be dismissed.

Minnesota Statute 179.54 is such a statute. There is no guidance in this statute as to who shall make the determination of violation of Section 179.51. Nor is there any guidance or procedure to determine which, if any, employees violated the statute. Possibly Petitioner's members were determined to be strikers on the basis of their organizational affiliation. It is almpst impossible to establish such discrimination after the fact. The only way to prevent it is to preclude the opportunity.

Respectfully submitted,

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70-152

JUL 21
E. ROBERT

In the
Supreme Court of the United States

October Term, 1970
No. ~~1686~~

Minneapolis Federation of Teachers, Local No. 59

Petitioner

v.s.

Douglas M. Head, Attorney General, State of Minnesota; Keith W. Davidson, Katherine V. Howard, Harvey A. Ring and Betty K. Robb, on behalf of themselves and all other Taxpayers and Residents of Special School District No. 1 of the City of Minneapolis; Special School District No. 1 and its Board of Education; City of Minneapolis Education Association; and John Doe

Respondents

SECOND SUPPLEMENT TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MINNESOTA

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Petitioner files this supplemental brief pursuant to Supreme Court Rule 24 (5).

On June 23, 1971, in Goldberg v. Cincinnati, 26 Ohio St. 2d ___, the Supreme Court of Ohio was presented with a case almost identical on the facts to that of Petitioner's herein. The major issue presented to that Court was whether the Ohio no strike law, the Ferguson Act, was self-executing. That is, were the public employees who struck thereby automatically terminated and subject to the statutory penalties.

The Ferguson Act, Ohio R. C. 4117.01 et. seq. is substantially the same as the Minnesota No Strike Law except for the following provision in R.C. 4117.04, which provides:

> "Any public employee who, (strikes) is on strike, provided that notice that he is on strike shall be sent to such employee by his superior by mail addressed to his residence as set forth in his employment record. . . ." (emphasis ours)

The Ohio Court held that where such notice was not sent there was no strike under the Ferguson Act and the provisions in that act were not effectuated.

> "It must be emphasized that R.C. 4117.04 expressly contemplates actual written notice to each employee that he is on strike. There is good reason for strict compliance with this condition. Even in the case of employees who are reinstated, the effects of their violation of the Ferguson Act

are severe and continue in force for as long as two years after reinstatement." Goldberg v. Cincinnati, supra.

In other words, the Court was emphasizing the due process importance of notice, in order to impose penalties of the type contemplated in the no strike law. The notice problem in Minnesota is more acute. There is no provision for notice under the Minnesota Statute. It has been assumed that the Statute is self-executing. The Ohio Court rejected that conclusion both on the basis of the statutory construction and on principle. The penalties are too severe to allow anything other than strict due process protections.

Minnesota Statute 179.56 requires the employee to file a request for hearing "within ten days after regular compensation of such employee has ceased", but there is no requirement for notice to the employee and it is unclear when that ten day period begins.

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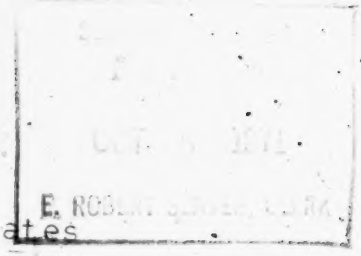

In the
Supreme Court of the United States

October Term, 1970
No. ~~1686~~ 70-232

Minneapolis Federation of Teachers, Local No. 59

Petitioner

-vs-

Douglas M. Head, Attorney General, State of Minnesota; Keith W. Davidson, Katherine V. Howard, Harvey A. Ring and Betty K. Robb, on behalf of themselves and all other Taxpayers and Residents of Special School District No. 1 of the City of Minneapolis; Special School District No. 1 and its Board of Education; City of Minneapolis Education Association; and John Doe

Respondents

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Petitioner files this supplemental brief pursuant to Supreme Court Rule 24 (5). Another facit of our Petition was recently discussed in Serrano v. Priest, Supreme Court of the State of California, in an opinion filed August 30, 1971. That case dealt with the constitutionality of the California public school financing system depending substantially on local property taxes.

Section 2 of our original Petition raised the issue of potential discrimination under the Minnesota "No Strike Law" against, for example, an aggressive teacher union or organization. Serrano raised a similar issue—whether the school financing system might result in discriminatory educational programs. The financing program was intentionally created but bore no reasonable relationship to the "fundamental right" (education) the system was designed to perpetuate. It contained great potential for discrimination. In support of that proposition the Court sites Harper v. Virginia Board of Elections, 383 U.S. 663 (1966) where this Court struck down a $1.50 poll tax, not because its purpose was to deter indigents from voting but because its result might be such.

The constitutional defect of the Minnesota "No Strike Law" is the chilling effect upon teachers joining particular bargaining organizations, not for the mere fact that strikes are prohibited, but because of the manner in which the law permits the school board to favor one organization over another when administrating the penalties of the Act. No adequate standards for delegating the powers are specified and no means other than judicial exist to prevent blatent discrimination. A

particular teacher organization may quickly find itself on the short end of school board decisions although all organizations may have participated in a strike. Whether or not members of a particular organization are, in fact, in violation of the No Strike Statute becomes immaterial if the school board chooses to favor administratively one organization over another. A school board may administer the law to favor an organization with younger members earning lower salaries; or, one with more women than men and a higher turnover rate than lowering district costs or for any other discriminatory reason. As a matter of practicality the teacher concerned about his job is going to look at the situation and join an organization in administrative favor

Potential penalties to a teacher under the No Strike Law are extremely grave. Arbitrary procedures, bearing no standards and subject to blatent discriminatory application are constitutionally insufficient to determine the fate of teachers accused of violating the No Strike Law. Seriousness of the potential consequences require the Court to view the proceedings in total. When this Court decided Duncan v. Louisiana 391 U.S. 145 (1968) it concluded the penalty for a particular crime was of major relevance in determining whether a jury trial was necessary. It looked beyond the mere classification of the crime as a petty offense to the potential penalty. Later, this principal was extended in Baker v. City of Fairbanks 471 P2d 386 (Alaska 1970) to an offense carrying serious consequences such as loss of a valuable license affecting one's occupation or business, although the legal penalty be small. When a legal penalt such as loss of a drivers license results in the further loss of an occupation or profession, the matter is worthy of serious and careful consider tion. Surely a teacher's rights to practice his

profession is as worthy of as careful judicial consideration as is a traveling salesman standing to lose his license when charged with driving while intoxicated when the teacher's license may be revoked because of some alleged illegal strike activity.

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Supreme Court, U.S.
FILED
AUG 27 1971

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 70-152

MINNEAPOLIS FEDERATION OF TEACHERS, LOCAL NO. 59
Petitioner

vs.

DOUGLAS M. HEAD, ATTORNEY GENERAL, STATE OF MINNESOTA; KEITH W. DAVIDSON, KATHERINE V. HOWARD, HARVEY A. RING AND BETTY K. ROBB, ON BEHALF OF THEMSELVES AND ALL OTHER TAXPAYERS AND RESIDENTS OF SPECIAL SCHOOL DISTRICT NO. 1 OF THE CITY OF MINNEAPOLIS; SPECIAL SCHOOL DISTRICT NO. 1 AND ITS BOARD OF EDUCATION; CITY OF MINNEAPOLIS EDUCATION ASSOCIATION; AND JOHN DOE
Respondents

BRIEF OF RESPONDENT KEITH W. DAVIDSON, ET AL.

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Dated August 25, 1971.

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In the
Supreme Court of the United States

OCTOBER TERM, 1970

No. 70-152

MINNEAPOLIS FEDERATION OF TEACHERS, LOCAL NO. 59
Petitioner

VS.

DOUGLAS M. HEAD, ATTORNEY GENERAL, STATE OF MINNESOTA; KEITH W. DAVIDSON, KATHERINE V. HOWARD, HARVEY A. RING AND BETTY K. ROBB, ON BEHALF OF THEMSELVES AND ALL OTHER TAXPAYERS AND RESIDENTS OF SPECIAL SCHOOL DISTRICT NO. 1 OF THE CITY OF MINNEAPOLIS; SPECIAL SCHOOL DISTRICT NO. 1 AND ITS BOARD OF EDUCATION; CITY OF MINNEAPOLIS EDUCATION ASSOCIATION; AND JOHN DOE
Respondents

BRIEF OF RESPONDENT KEITH W. DAVIDSON, ET AL.

OPINION BELOW

The opinion of the Supreme Court of the State of Minnesota (App. pp. 72-91 of Petition) is reported at 182 N. W.2d 887. It has not been reported in the official Minnesota Reports as yet.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition. The jurisdiction of this Court is invoked under *28 U.S.C.A.* Sec. 1257 (3).

QUESTIONS PRESENTED

1. Whether a state which places full authority in a school board to determine the salaries of its tenured and nontenured teacher employees without affording aggrieved teachers opportunity for an evidentiary hearing, or other adequate remedy, to determine the reasonableness of those salaries, denies teachers substantive and procedural due process in violation of the Due Process clause of the Fourteenth Amendment.

2. Whether a state statute which allows a school board to terminate the employment and compensation of tenured and nontenured public school teachers without affording them opportunity for review or for hearing prior to termination denies those teachers procedural due process in violation of the Due Process clause of the Fourteenth Amendment.

3. Whether state statutes which impose no penalties on one group of striking public employees but imposes automatic and harsh penalties on a second group, and which provides the first group with more effective impasse procedures than are provided for the second group, constitutes a denial of equal protection in violation of the Equal Protection clause of the Fourteenth Amendment.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The pertinent provisions of the *Minnesota Statutes* involved (Sec. 125.12, 125.17, 125.19 to 125.26, 179.35 to 179.39, and 179.50 to 179.58) which are relevant to the decision in this case are set forth in the Appendix pp. 23-45 of Petition. *U.S. Const.*, Amendment XIV, Sec. 1.

STATEMENT

The Attorney General intiated this action in the District Court, Hennepin County, Minnesota, under the Declaratory Judgment Act (*M.S.A.* ch. 555) against the Minneapolis School Board (School Board), the Minneapolis Federation of Teachers, Local No. 59 (MFT) and the City of Minneapolis Education Association (CMEA) to test the validity of a settlement made between the School Board, the MFT and the CMEA to end a strike by some of the teachers in the Minneapolis school system in April, 1970. A group of taxpayers headed by Keith W. Davidson, et al. (Intervenors) intervened in the action as parties plaintiff.

The settlement between the School Board, MFT and CMEA is incorporated in three resolutions identified as A, B, and C. Resolution A is summarized in the Supreme Court's opinion (App. pp. 79-80 of Petition) in the following language:

> "the board rehired the striking teachers under the provisions of Sec. 179.55 and intends to pay to each of them as part of his or her last paycheck for the school year 1970-1971 an amount equivalent to the difference in pay between what that teacher was paid during the 1970-1971 school year and what he would have been paid during the school year if he had been

> employed at the appropriate step and lane of the 1970-1971 salary schedule."

Resolution B is summarized in the Supreme Court's opinion (App. p. 80 of Petition) in the following language:

> "the board paid each of the striking teachers for 7 days during the strike period (April 20-24, 27 and 28) an amount equal to their regular compensation."

Resolution C was severed for trial at a later date (App. p. 54 of Petition) and was not passed upon by the Court.

The matter was tried to the Court on a stipulation of facts. The Court found Resolutions A and B to be null and void (App. p. 57 of Petition) and ordered judgment accordingly. The Judgment was affirmed on appeal (App. p. 91 of Petition).

ARGUMENT

I.

THE DECISION BY THE STATE COURT IS CORRECT

The State Court held Resolution A would result in an increase in compensation during the year after rehiring above that received prior to the strike, contrary to the provisions of Sec. 179.55 and cannot be sustained (App. pp. 90-91). Public employees have no common-law right to strike. *Anderson Federation of Teachers, Local 519 v. School City of Anderson,* 251 N.E.2d 15, cert. denied (1970), 38 U.S. L.W. 3522, Case No. 1571 (1970). A codification of the common-law prohibiting public employees to strike (*M.S.A.* 179.51) does not change the law.

Minnesota Const. Art. VIII, Sec. 1 imposes upon the

legislature the "duty . . . to establish a general and uniform system of public schools." It is an elementary principle of law that a duty so imposed cannot be legislated away. The Legislature can and has delegated some of its authority to school districts, but it can never relinquish its position of responsibility and superiority over the school district. Any authority granted by the Legislature may be retrieved or restricted by subsequent legislation. In this instance, the Legislature through the enactment of *M.S.A.* 179.55 has restricted the School Board in the amount it can pay to a striker, if the School Board rehires him. The School Board is bound by the restriction imposed upon it by the Legislature.

Counsel for Petitioners argue that this restriction placed upon the School Board is unconstitutional because there is no provision for review as to reasonableness. The School Board gave the strikers the maximum permitted by law and endeavored through Resolution A to give more. The granting of the excess is what gave rise to this litigation. The Legislature has the inherent power to fix salaries of all public employees, and its decision is not subject to arbitration, negotiation or any other form of determination unless it sees fit to make it so. The Court has never seen fit to impose upon the Legislature the duty to arbitrate, negotiate or otherwise relinquish its absolute power in legislative matters.

Counsel for Petitioners argue that "important statutory rights are subject to procedural due process review before such rights may be terminated" (p. 13 of Petition). The decision by the Minnesota Court was not based upon due process. The Court merely determined that Resolution A violated *M.S.A.* 179.55 (App. p. 91 of Petition). Likewise,

the Court determined that Resolution B was null and void because the recipients were not employees (*M.S.A.* 179.-54) and presumably the payment for seven days when no services were performed would constitute a gratuity of public funds (App. p. 90 of Petition).

In the case of *Freeman v. Special School Dist. of Lincoln Co. Ark.*, 405 F.2d 1153 (1969), the Court made the following observation:

> "The plaintiffs view the Board's position in sustaining Dalton's recommendation for not renewing their contracts and placing upon them the burden of securing Dalton's approval as arbitrary and capricious and a denial of federal due process under the Fourteenth Amendment. Stripped of the racial issue this case presents no federal question."
>
> 405 F.2d 1157.

Stripped of the contentions that Petitioner's rights under the Due Process and Equal Protection clauses of the Fourteenth Amendment have been denied, there is no federal question presented. That the Petitioner has not been denied such rights will be argued in the next two sections of this brief.

II.

THERE IS NO DENIAL OF CONSTITUTIONAL DUE PROCESS PROCEDURE

The issue of a hearing and the manner of conducting the same were not presented in the case at bar, nor does it form the basis for the Court's decision. That issue was severed for trial at a later date (App. p. 54 of Petition). The Court in this Declaratory Judgment proceeding

did not endeavor to determine who the strikers were. Such determination is in the first instance for the School Board to make, subject to a hearing, if requested, in accordance with the provisions of *M.S.A.* 179.56.

In the case of *Freeman v. Special School Dist. of Lincoln Co. Ark., supra,* the Court said:

> "When a particular statutory procedure is set up for the dismissal of a teacher it must be followed, but absent statutory procedure the Board may adopt its own method. 47 Am. Jur., Schools, Sec. 125 (1943)."
>
> 405 F.2d 1160.

III.

THE DECISION DOES NOT DENY EQUAL PROTECTION

The question is whether teachers have been placed in a position by the provisions of the no-strike statute and its attendant provisions so that they are denied equal protection of the law in violation of the Fourteenth Amendment. Petitioner compares the provisions of *M.S.A.* 179.51, et seq., which cover teachers with the provisions of *M.S.A.* 179.35, et seq., which cover charitable hospital workers, including those who work in public hospitals. The Charitable Hospital statutes make it unlawful for workers to strike and subjects them to binding arbitration (App. pp. 42-45 of Petition).

Equal protection requires that when the legislature identifies one class of persons for treatment different from that accorded another class, then the distinction between the two must be logical and must be relevant to the achievement of a valid state objective. The United States Supreme

Court has said words to this effect in *McGowan v. Maryland*, 366 U.S. 420 (1961), wherein the Court upheld a conviction under the Maryland Sunday Closing Laws. Rejecting a defendant's argument that the statute violated equal protection by permitting the sale of certain commodities on Sundays while forbidding the sale of others, the Court stated:

> "Although no precise formula has been developed, the Court has held that the Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrevelant to the achievement of the State's objective."
>
> 366 U.S. 425.

The Minnesota Supreme Court has enunciated the same standard in numerous cases, a recent example being *Halverson v. Rolvaag*, 274 Minn. 273, 277, 143 N.W.2d 239 (1966), wherein the Court said:

> "Equal protection of the law requires that legislative classifications be founded upon some real and substantial difference bearing a fair relationship to the legislation so that the law operates equally and uniformly on all persons similarly situated."

The Supreme Court of the United States and of Minnesota have both adhered to the principle that the creation of such distinction is largely a matter of sound legislative discretion which must be respected by the courts in the absence of a clear showing of abuse. In the *McGowan* case, *supra*, the Court stated:

> "State legislatures are presumed to have acted within

their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it."

366 U.S. 425-6.

The Minnesota Court has provided an even more definitive guideline than that provided by *McGowan, supra.* In *Minneapolis Federation of Teachers v. Obermeyer,* 275 Minn. 347, 147 N.W.2d 358 (1966), the issue was whether the Minnesota legislature has violated the equal protection clause by distinguishing between teachers and other public employees in *M.S.A.* 179.572, for the purpose of exempting the former from the negotiations and arbitration provisions of the Public Employees Labor Relations Act. The Court held that the statute did not offend equal protection and stated the following with regard to the legislatively created distinction:

"When the legislature had determined that a sufficient distinction exists between two classes of perons to justify applying rules to one class which do not apply to the other, such determination is binding upon the courts unless it appears that the distinction is purely fanciful and arbitrary and that no substantial or logical basis exists therefor. Classification can never be a judicial question except for the purpose of determining in a given situation, whether the legislative action is clearly unreasonable. In the matter of classification courts have viewed the action of the legislature with great liberality. Courts are not to weigh the merits of a classification in the judicial balance and to reject it merely because they might favor a different standard. These principles are supported in numerous Minnesota authorities. . . ."

147 N.W.2d at 363-4.

In the same *Obermeyer* case, the Court made the following observation relative to the legislature's ability to classify various professional groups:

> "It is well recognized that the legislature may classify professions, occupations, and business according to natural and reasonable lines of distinction, and if such legislation affects alike all persons of the same class, it is not an invalid classification. Legislation with reference to the teaching profession has generally been sustained as a valid classification. 16A C.J.S., Constitutional Law, Sec. 496. The Supreme Court of Illinois has held that a classification of public school teachers as a distinct class for appropriate legislation 'cannot be successfully challenged.' Gorham v. Teachers' Retirement System, 27 Ill.2d 593, 599, 190 N.E.2d 329, 332."

147 N.W.2d 364.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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Dated August 25, 1971.

CERTIFICATE OF SERVICE

I hereby certify that on this —— day of August, 1971, three copies of Brief of Respondents Keith W. Davidson, et al. in opposition to the granting of a Writ of Certiorari were mailed, postage prepaid, to:

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counsel for Petitioner and other Respondents in the case. I further certify that all parties required to be served have been served.

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